MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 25, 2003

Item 1: 2002-34: DELAY REDUCTION

JUSTICE CORRIGAN: Welcome to the Michigan Supreme Court for our public hearing on a number of items of interest to the bar and the public. As you know the rules of our Court with regard to public hearings suggests that every speaker is limited to 3 minutes and we would ask especially with regard to Item 1 on Delay Reduction that the speakers, all of whom are well known to this Court, attempt not to be redundant in your presentations. We have voluminous materials from you which we have reviewed and are prepared on so I ask that you try to make points different from the previous speaker. With no further ado I will call the first speaker, Evelyn Tombers.

MS. TOMBERS: Good morning, Madam Chief Justice, Justices. I'm Evelyn Tombers and I'm here as the author of the State Bar's first task force report, that would be the Meckers Task Force. Delay reduction was presented to us as a complete plan. Shortly thereafter President Meckers of the State Bar convened the task force and together the group of attorneys that served on that task force with no data from the Court other than what we already had, came up with several alternatives. And in essence we supported several of the amendments, some of which have already been adopted, but the reduced time for filing the docketing statement, filing only the portions of the transcript that dealt with the summary disposition motion, those kinds of things, are the ones that we supported. However we strongly opposed the amendments dealing with shortened briefing time and eliminating the stipulations to extend. Now certainly we recognized that delay reduction was an important objective for the Court of Appeals and we commended Judge Whitbeck and I personally would still like to commend Judge Whitbeck for the progress that the court has already made. But as for the briefing time cuts and the cuts in stipulations to extend, they are still premature. We came up with several alternatives through the task force that could serve to cut delay or certainly deserve to be looked at, and they are in our task force report starting at page 10 under heading 8, Alternative Ways to Reduce Delay. And I won't belabor them here. But I believe that before the Court starts to examine cuts in briefing times to attorneys that could affect the quality of the briefing that the court sees, certainly the quality of the appellate advocacy, that the Court would consider the alternatives rather than cutting the briefing and cutting the stipulations to extend. And I know others will be addressing many other reasons why.

JUSTICE CORRIGAN: Thank you Professor. Do the Justices have any questions? Justice Markman.

JUSTICE MARKMAN: Yes, Ms. Tombers, one thing that keeps coming to mind when I mull over the issues in this debate are that we have many other sister states in the union that have much shorter briefing times than we do in Michigan, in our neighboring state of Ohio, for example, as you know, appellant's brief is due within 20 days, the appellee's brief within 20 days, and the reply brief within 10 days. Is there any evidence that the quality of justice in these states or the quality of briefing in these states is less high than it is in Michigan under our present rules and is this a relevant consideration in looking to see what we ought to do here in Michigan, that is, what the timing is in other states.

MS. TOMBERS: I certainly don't have any evidence about the quality of briefing in Ohio. I'm sorry to say that the task force did not take a look at those issues as far as other states. I would be curious to know, however, Justice Markman, what the rules in Ohio are about stipulations to extend time for briefing or motions to extend time. I know, for example, in California the motions to extend time are liberally granted.

JUSTICE MARKMAN: I think they have by motion for good cause just like the proposal in Michigan would set forth.

MS. TOMBERS: Okay. And again, that opens another can of worms about the good cause and increasing the work on the court for having now to decide motions to extend the time.

JUSTICE MARKMAN: But my point, Ms. Tombers, and I'm not sure I'm right here but there have been a lot of suggestions that if we introduce what Judge Whitbeck is proposing, what the Court of Appeals is proposing, all sorts of horror stories will result. And my question is, is there any evidence of such horror stories in Ohio and other states that in fact have even shorter period of time than the Court of Appeals is proposing.

MS. TOMBERS: I don't know if we have evidence from Ohio. I would be happy to do some research and report to the Court on that but the task force didn't get into briefing in other states. We simply looked at the procedures that were being proposed here in Michigan. And what alternatives could exist.

JUSTICE CORRIGAN: Thank you Professor Tombers. Terry Flanagan of MAACS.

MR. FLANAGAN: Good morning, Your Honors, I'm Terry Flanagan. I'm the administrator of the Michigan Appellate Assigned Counsel System. That's the state agency that oversees the system itself and the private attorneys that handle roughly 75% of the appointed criminal appeals in this state. And as the criminal appeals themselves comprise about 50% of the Court of Appeals' docket so whatever this Court decides to do

on the Court of Appeals' proposal heavily impacts my office and the attorneys under me. I'll try to say two things that are unique to private attorneys and assigned appeals that impact on the dread that will be brought down on the attorneys if this proposal is implemented. I recognize that the amended proposal now keeps the time at 56 days but would still eliminate stipulations and still require extensions for good cause shown. But essentially we would be at 56 days whereas right now you can file a brief within 112 days and still be timely. I think two negative things will happen. Primarily I believe that there will be more cases that appear on the Court's involuntary dismissal docket, a serious problem some years ago that you, as Chief Judge then, Chief Justice Corrigan, cleaned up, shall we say. Now those numbers are significantly less. The attorneys are getting their briefs in quicker, or within the 112 days and when 113 or day 57 rolls around, depending on whether the attorney has requested an extension, the Court of Appeals is pouncing, strictly enforcing the existing rules and setting out that 21-day warning letter. So if our attorneys with all they have to do can't get the briefs in in time, that will mean ever so more many cases being placed on the involuntary dismissal docket and I can't give you a number because it's highly speculative but in fact that will mean that the time will start all over again when new counsel is appointed to begin anew, and I'm not sure how that benefits a delay reduction plan. The second thing is that another whine that is particular to the private attorneys in my office is that it's difficult for me to recruit people to do these criminal appeals. Many do them essentially on a pro bono basis because of the fact that it helps enhance their trial based practices. Or they just like doing it. They're glutton for punishment. But they're not making much money quite frankly. And we've got a county by county, circuit by circuit system of payment and one of our circuits, the worst paying circuit that I'll use as the worst example, is Macomb circuit. Their rate is $25 per hour. That rate was set, Chief Justice Corrigan, when you were clerking in your first job out of law school for Court of Appeals judge, the late John Gillis. Justice Young, you were not yet graduated from undergraduate school when that rate was set. I was in my final year of law school. 30 years ago is when that happened. And yet our attorneys are working for $25 an hour in that circuit. Other circuits they might make $50 an hour but it's capped at $750. That's the most they can make on a case. Court of Appeals will institute $250 fines, or assess costs rather, if you make the involuntarily dismissal docket. What incentive do these attorneys have to even join our roster to do appeals and get bludgeoned like this.

JUSTICE CORRIGAN: We understand your point Mr. Flanagan. Are there any questions? Justice Markman.

JUSTICE MARKMAN: Mr. Flanagan, is your testimony today given in light of the fact that the Court of Appeals is no proposing no reduction in the briefing time for criminal appeals.

MR. FLANAGAN: I recognize that the 56 to 42 has been bounced back to 56 but we want to keep the 28 days stips, and we want to keep the 28 day extensions or the total of 112 days in which to file a timely brief on appeal and preserve orals.

JUSTICE KELLY: Were you finishing a point there, Mr. Flanagan.

MR. FLANAGAN: With regard to the monies to be paid to the attorneys?

JUSTICE YOUNG: You were making a point that there was a financial disincentive given the shortening of the time.

MR. FLANAGAN: There certainly is a financial disincentive and I guess my point was it's difficult for me to recruit or retain them after I get them on my roster when the money is so less, and now people are going to presumably be making that involuntary dismissal docket more often and be fined $250 which might be 1/3 or 1/4 of the total sum they might have made had they remained on the case. They're going to say sorry, I don't need this.

JUSTICE MARKMAN: Mr. Flanagan, can I ask you one more question please. There has been a great deal of testimony on the part of both civil and criminal advocates in terms of what they believe will be the diminishing quality of briefs as a result of the new timing deadlines. Is it your sense or would you assert that there has been any reduction in the quality of the Court of Appeals opinions themselves as a result of what efforts thus far have been undertaken to expedite the process.

MR. FLANAGAN: I guess I can't say I've been reading every unpublished opinion as it comes out so it's difficult for me to say that but certainly that's the rumor, that's the word that is out on the street, so to speak, that opinions are lacking in the detailed intellectual finite points that we've been used to from the Court of Appeals in the past.

JUSTICE CORRIGAN: Okay, thank you. Jim Gross.

MR. GROSS: Good morning, Your Honors. I'd first like to thank Corbin Davis for not putting me behind John Jacobs. Too bad Vic. I'd like to address Judge Markman's point and I think it's one worth taking. Asking for evidence of diminishing quality in other jurisdictions is something that you're just not going to have. What is quality? Where would we generate those statistics? It's much too subjective. However, I would like to address that. Let's start from the premise that an appellate presentation is better done when it's done by somebody who does it full time. I'm just going to take that as a premise. I'm not asking for response there. More and better full time practitioners would therefore be necessary to maintain a level of quality. Now as to Michigan being the only jurisdiction in the country to allow practitioners to move a deadline within

certain time limits, and I'm not suggesting that other jurisdictions don't have other mechanisms that accomplish the same thing, but let's indulge that assumption for a second, that we're the only ones. I say bully for us. I and five other Michigan attorneys are members of the American Academy of Appellate Lawyers. We meet regularly at conferences with our fellows from all over the country. And having met with them numerous times comparing notes about who does what in what jurisdictions and the difficulty of finding new members from jurisdictions because they don't have an appellate bar to speak of, I can say that with the possible exception of California, Michigan has the largest, most active and most cohesive appellate bar in the country. I think John Jacobs and Kathleen Lewis who also regularly attend these academy meetings will vouch for me on that one. We're the ones doing the quality of the work that you say you want. And I understand that quality is continuing to be an issue of concern for the Court. I don't think it's a coincidence that we have a set of appellate rules which allow us to make a viable living specializing in appeals. And having spent most of my 3 minutes on this I don't have time to do the other half of the presentation in which I was going to explain why predictable flexibility is absolutely necessary for us to be able to maintain a viable case load, one that allows us to make a living. 21, 33 and 56-day deadlines just come on us. They can and do fall frequently within days of one another. We need time to take in new files. We have to interview trial attorneys, we have to prepare post-judgment motions. We have emergencies. I've had three of those in the last two weeks, one of which I had yesterday. And overlaid on all of that is the fact that briefs require large blocks of time. It's not something I can spend an hour on this week, something comes up, I leave it and go back and spend another two or three hours next Friday. We have to have the flexibility to set these blocks of time. And contrary to the impression that seems to exist in some corridors, the key to caseload management in our practice is to do projects as early as you possibly can. It's suicide to do anything else. So there is no culture of delay, at least not among people who do this full time for a living.

JUSTICE YOUNG: This is an extraordinary divergence from my experience in practice.

MR. GROSS: I can't vouch for your experience in practice, Your Honor.

JUSTICE YOUNG: I understand that. Let me ask you, we have with extensions up to 112 days to file the initial appellant brief. Have you any other comparative data about other jurisdictions on the amount of time to file the initial brief.

MR. GROSS: That is available, or that is generally used.

JUSTICE YOUNG: Is Michigan within the mainstream of allowing that much time or is it standard deviation or two outside the mainstream.

MR. GROSS: I can't answer that.

JUSTICE YOUNG: Is that relevant.

MR. GROSS: No, I think what's relevant is how much of that time is used. I think how much of that 112 days is actually used is a much more relevant figure than whether it's available or not.

JUSTICE CORRIGAN: When the ABA sets a standard that says an appeal should be resolved within 12 months, and the Michigan Court Rules give the lawyers and the record production 10 months of that time, is that a fair working time for the Court.

MR. GROSS: I don't know if it's 12 months or 18, but

JUSTICE CORRIGAN: I do. It's 12. We have 18 in Michigan because of the court rules that accord--

MR. GROSS: For inaudible cases or all cases.

JUSTICE CORRIGAN: For all cases. The American Bar Association study is what set that standard throughout our country. And I'm wondering why Michigan should be so far out of the loop.

MR. GROSS: Two responses. First, I'm not sure we're not comparing apples with something else. If the ABA standards talk about all cases and our guidelines are only focusing on published cases. Second, I agree that 112 days looks like a long time to me. It is a long time. I probably use that amount of time once every year and a half or two years, and that's on an extraordinarily large case. So if the Court wants to look at reducing that end of it, there is nothing to stop the Court of Appeals from tightening its standards for granting the motion for extension. Either saying we are now going to start looking at these things for merit to see what you have been doing for the last 28 days to make sure you have good cause, or alternatively, possibly limit the number of days you can get after your stipulation. That's not an unreasonable topic to look at. What is unreasonable is to remove from the practitioners any, and I'm going to use the word, however we do it, whether we do it by stipulation, some predictable flexibility so I know that I don't have to start turning down cases because I have a brief due in three weeks and it's going to be drop dead if I don't get it filed.

JUSTICE WEAVER: Mr. Gross did you submit a written statement.

MR. GROSS: I did, Your Honor.

JUSTICE WEAVER: And in that you've covered all the points you don't feel you have time to get in here.

MR. GROSS: Yes, Your Honor. Well, there's a ton more to say but I've said what I wanted to say.

JUSTICE WEAVER: You have said all you wanted to say?

MR. GROSS: Yes, Your Honor.

JUSTICE MARKMAN: Mr. Gross, I just wanted to congratulate you. I think you may have introduced a wonderful new oxymoron into the American language, predictable flexibility.

MR. GROSS: Thank you, Your Honor.

JUSTICE CORRIGAN: Thank you. Next we'll hear from Anica Letica.

MS. LETICA: Good morning. Thank you for allowing me this opportunity to speak on behalf of my office. I work with the Oakland County Prosecutor's Office and I will let you know that the quality of my brief writing has been affected. Recently the Court of Appeals eliminated a courtesy that had previously been extended to my office which was that we did not pay for motions to extend time for filing a brief, which we always took advantage of. When the Court decided to remove that, in our current budget crisis, we decided that we could not afford to pay the cost of motions, so we did cut back to the stip date. It did affect the quality of writing. It did affect the ability to edit. It did affect the amount of research that was done on any given issue. Now the Court is suggesting eliminating stipulation time and only allowing us to file motions. We can't afford to file motions. That means that we must work on the drop dead date, which in this case 35 days. It seems like a long time but that is not 35 working days. As much as I would love to work every single day, weekends, on behalf of the people and for the victims in a job that I love, I can't do that because I do have other obligations and I do have another life. When I was driving up this morning I saw outside of this Court, it says truth and justice. Yes, that is what my job is about. That is what I want for my victims and for the people of this state. I want justice, I want the ability to represent them adequately. And I'm not going to get that if I have 35 days and they are not all working days.

JUSTICE CORRIGAN: Okay. We understand your point. Thank you Ms. Letica.

JUSTICE KELLY: Let me just say a word. I know you have been a very sincere advocate from the days that you were with us on the Court of Appeals and you have been with the prosecutor's office in Oakland County for how long now?

MS. LETICA: It's now been 12 years.

JUSTICE KELLY: Time flies. Thank you.

JUSTICE CORRIGAN: John Patrick Jacobs.

MR. JACOBS: If the Court please, I'm John Patrick Jacobs. I've been practicing appellate law for 33 years. I am a person of a certain age in that I am so old now that I need reading glasses and so old that I forget them most of the time. I'll take my 3 minutes to talk about handling box cases which is all my office does. We have 35 box cases and 56 cases total. My associates, Mr. Inaudible and Mr. Martin Gaffney are working 70 hours a week, as am I. We are just about at wits end. Let me tell you about the practicalities of law practice in a small firm or in a large one, for that matter. And that is that we cannot work on one case at a time. We have to keep enough cases in the pipeline so that the secretaries with their not inconsiderable salaries, my malpractice insurance gets paid, my rent which is killing me gets paid, all the things that happen. I'm bobbling these cases all the time. Why is their unanimity among the bar here. There is unanimity among the bar because we recognize that what is being said is making us the sacrificial victims and we don't want that. Justices of this Court have practiced appellate law and certainly all of you have had, as practitioners, experience with the practice of law as it pertains to appeals. The average one of my cases numerically is $4.4 million. The average one of my cases is 3 weeks of trial transcripts. I don't care how many staffers I hire, I cannot possibly put that in timely in 42 days. I cannot do it. I can barely do it in 112 days. I can barely put a decent brief together in 112. Frankly it doesn't make any sense to me from a rationality perspective to make me hurry up and work 110 days a week if it's possible to do, which of course it isn't, to have these cases sit in the warehouse. The real problem here is that we need funding. The Court of Appeals needs the funding and however we arrive at it, that's the real issue. I don't want to be in the position ever, Justices, ever, of balancing whether or not I get oral argument versus my legal malpractice issues. I've never been sued for malpractice, thank the Lord, but I can tell you that if I'm going to do a decent brief I'm going to have to give up oral argument because I can't do both. Not under these circumstances. One of the reasons I was asked to speak today is because I actually am one of the Michigan practitioners that has--a lot is probably an exaggeration--but a considerable amount of experience in other jurisdictions where I'm either directly or second-chairing appeals. And Justice Markman, in answer to your question there are other jurisdictions, 20 days is a very short time for Ohio. They have a second track that you can move for. What I know is that in the states that have rather brutal 30 day and federal circuits that have a rather brutal 40 day or 44 day timeline, I can only take one or two of those cases at a time. Let me tell you what I mean

by that. My office has a firm rule. We do not take more than 2 active 6th Circuit cases at any one time because we cannot coalesce them and make them come out at the same time. I will take one Court of Appeals--

JUSTICE CORRIGAN: Your time is up. You can finish this thought.

MR. JACOBS: I will finish with this thought. I frankly do not want to be told that I am not an equal partner in the justice process. You can only decide cases well if I have had the opportunity to give you a decent brief and give you a meaningful oral argument. Now on box cases that's 112 days plus the 112 days. I can tell you now it is. And more than that I stand for questions.

JUSTICE MARKMAN: Mr. Jacobs I don't mean this question to sound flippant but do you think there would be a different tenor to the hearing this morning if instead of having only members of the bar we had some clients testify.

MR. JACOBS: Yes. And the tenor would be different in this sense. If I can speak for my corporate clients I'm 100% corporate defense practitioner on appeal. My clients say we don't really care about the interest that's being taxed against us. We want a decent job. They don't care about--you know what, the fixation on delays that seems to be from your side, from the bench's side, is addressed in the marketplace by MCLA 600.6013 interest. That's how that's handled. And my clients with their million dollar liabilities, they want me to do a good job and have a decent opportunity to overturn those verdicts. I almost never do appellee work. And they're willing to pay that interest. They're willing to pay it, and that's how it's adjusted. They want a decent opportunity at justice. They don't care about the delay which ends up in interest being taxed. Any other questions?

JUSTICE TAYLOR: Mr. Jacobs, I think Chief Judge Whitbeck will probably testify later that with their recent hires and prospective hires perhaps, that they're planning to, they think--I may have this slightly off but 7 or 8 months out in the future that the warehouse, as it's now described, will be gone, and that's why these rules are needed. Can you talk about that.

MR. JACOBS: Judge Whitbeck, whom I have the greatest respect for, and I'm not being patronizing when I say that, I really mean it. How he administers the Court is something I don't have the expertise to speak to. Here's what I know. I know that in the states where I practice, and this answers Justice Young's questions, 112 days is on the high side. In Michigan it is, it's on the high side of extensions of time that are mandatory. But here's what it does for us. It gives us the bracket of living humanly. I'm already working like John Henry, for crying out loud, and that's with 112 times 2. And that allows me, I took my daughter on the inaudible for two weeks, on vacation, best vacation

we ever had. If I didn't have 112 times 2 I never would be able to do that. I wouldn't be able to have the surgery I had last October without 112 times 2. These are things that make my life better and my clients, when they have a happy lawyer they have a winning lawyer. And that's how they see this. So the answer to your question, I do not have Judge Whitbeck's expertise about what's going to happen. I know about the practice of law. I know nothing about judging.

JUSTICE TAYLOR: The final question. Are you happy about speaking after Gross.

MR. JACOBS: Well let me tell you that I came with a prop and you'll see one from Jim Neuhard, I think, and that was Mark Van Zato (?) to show unanimity among the bar and Mark never got here so he's going to get hail Columbia when I see him. Any other questions?

JUSTICE WEAVER: You submitted a lengthy statement. Was there anything else besides what you said that's not in that statement that you wanted to say?

MR. JACOBS: I don't know. Is there such a thing as a motion for pity?

JUSTICE YOUNG: I think you've made that one.

JUSTICE CORRIGAN: Victor Valenti.

MR. VALENTI: Thank you, Your Honors. I'm here in my role as current chair of the State Bar's Appellate Practice Section. We've submitted our August 28 letter and attached to it I think is our earlier September 4, 2000 letter. Obviously we actively oppose the proposed amendments. I will rely on those letters and I'm pleased to follow Jim Gross and John Jacobs and I'm pleased proceed, and all the rest of the seasoned appellate attorneys who are here and who are going to tell you better than I. What I really want to stress to the Court is what the Section has done and will continue to do in the 18 months since the Court of Appeals announced its delay reduction plan. The Section has actively supported reducing appellate delay. And we actively support the amendment that's on the table for MCR 7.204(H)and 7.210(B) and (G). And despite the economic sting to both our clients and to ourselves we've written and actively supported the proposal to increase the fees and to assist the court in getting some additional prehearing attorneys. Despite the fact that we weren't consulted before the delay reduction initiative was announced, we have supported the initiative because it is consistent with the Section's purpose in advancing the productive and competent operation of the appellate courts and the administration of justice so the bench and bar may better serve the public interest. But these amendments really amount to a situation of if it ain't broken, don't fix it. Based on what the Court has heard and will hear today, we're asking the Court to conclude that this proposal that's on the table is fatally flawed. But what I do want to do is I want to pledge that if the Court agrees that the Court of Appeals' current proposal is

not the solution, the Section will stand with the Court and we're prepared to redouble our efforts with the Court of Appeals to seek a solution that's going to be a win-win for the clients, for the general public, for the court itself, and for the appellate attorneys. Does the Court have any questions?

JUSTICE YOUNG: The ABA standards are for intermediate appellate courts. That they should resolve 95% of all appeals within one year of the filing of the notice of appeal. For the reasons Chief Justice Corrigan stated, she made a commitment to the Legislature at that phase of delay reduction to, I believe it was 80% within 18 months, was it?

JUSTICE CORRIGAN: I think we said 95% within 18 because of the structure of the Michigan Court Rules, it was always an issue with the Legislature that we were so far out of whack.

JUSTICE YOUNG: We are, even with that commitment, a half a year longer than the ABA standard is. Now have you a quibble with the ABA standard and if you do I guess I'd like to know what it is. And what should we be doing in terms of what the ABA's national survey has resulted in this as their standard.

MR. VALENTI: I don't quibble with the ABA standards. What I would point out, and I think Mr. Fulkerson can probably address this better than I but my understanding of the statistics is that with the current elimination of the warehouse we would be at 89% of this 95% figure that we're trying to reach.

JUSTICE YOUNG: In 18 months. Not one year. My question is, unless the argument is we should disregard the ABA standard, the one that all the other courts measure themselves against, we ought to be moving closer to it, don't you agree.

MR. VALENTI: I think we are moving closer to it and yes, I agree that we ought to be moving closer to it. But on the other hand I guess I would echo what Mr. Gross has said, that the system is a system that allows us to practice and if in fact we can't achieve the ABA standards within the current system, my suggestion is that the ABA standards are not accurate for our experience.

JUSTICE MARKMAN: Mr. Valenti, you've reiterated this morning what you've already submitted to the Court to the effect that we should reject the amendments and order the bench and bar back to the conference rooms, I think you say, to develop an alternative plan. Are there any circumstances under which you can envision the bar, the appellate practice section, favoring any kind of reduction in the time frame for lawyers. When you go back and you sit down in the conference room again, are there any circumstances in which you can see that as being a negotiable item.

MR. VALENTI: A hard and fast reduction, no. But as has previously been indicated and I think is in our written testimony, we think there is room for adjustments and we think the Court has within its own power at this point to look seriously at okay we will not do pro forma grants of the second motion for a 28-day extension. That perhaps those can fit under a good cause requirement, and let the court try it there and see where we are a year or two down the road.

JUSTICE MARKMAN: I just want to understand. When you go back to the conference room as you're volunteering to do, that issue of time frames is still not going to be back on the table.

MR. VALENTI: That issue of time frames? Everything is on the table, Justice Markman. Everything is on the table and we are here to negotiate in good faith with the court and to try to achieve something that we all can live with.

JUSTICE YOUNG: Do you have a single suggestion for shortening any of the briefing time.

MR. VALENTI: I think that perhaps is the suggestion, is for the Court of Appeals to instead of just pro forma granting motions for extensions, to begin to look at those with an eye toward the good cause standard and you know perhaps instead of automatically granting those, see what can be worked out by using those--

JUSTICE YOUNG: Mr. Jacobs apparently only handles box cases. Do you think every case that comes to the Court of Appeals is a box case.

MR. VALENTI: Absolutely not.

JUSTICE YOUNG: Well does that suggests any management technique for differentiating among cases in terms of the time it takes to do an appeal.

MR. VALENTI: I know that differentiated case management has been discussed--

JUSTICE CORRIGAN: Well that was rejected a few years ago. It was a proposal that I made as chief judge of the Court of Appeals and the appellate bar was not supportive of that. They were against differentiated case management with regard to setting different timelines for box cases versus more routine appeals. So I have--this is dejavu all over again because differentiated case management is no longer, as far as I'm concerned, a viable alternative because of the bar's opposition to it several years ago.

MR. VALENTI: I would suggest that it all be put back on the table. I mean I can't say anything more than that. And I think--

JUSTICE CORRIGAN: I mean there is a solution to the warehouse and that is just in time inventory which was proposed, so that Mr. Jacobs' box case, he would get a due date 112 days out for a difficult case, and a routine case would get 30 days. That's been there before, that's gone.

MR. VALENTI: The problem has always been that a due date, that is an inflexible due date, or appears to be an inflexible due date I think has always been the real problem and that was, at least personally that was the problem I had with the plan that you proposed back in '97-'98.

JUSTICE YOUNG: If there were an ability to move for an extension should something occur, why is this a problem?

MR. VALENTI: The problem is we don't know what good cause is. And the second problem that attached to that is the fact that the court which is clearly overworked now is asking for more work for someone to make determinations as to what good cause is when until now you've had a bright line test.

JUSTICE YOUNG: Thank you. I hope somebody who opposes this will come up with some alternative to address the ABA standard, that moves us closer to it, instead of saying we can't change. I hope there's somebody.

JUSTICE CORRIGAN: Thanks Mr. Valenti. Don Fulkerson.

MR. FULKERSON: Good morning, may it please the Court, I'm Don Fulkerson. I'm the immediate past chair of the State Bar's Appellate Practice Section. I'm here on behalf of the section and on behalf of myself and my clients. I'm a sole practitioner specializing mostly in appeals. I want to answer every question I heard today and I'm going to try--I have two main points of my presentation and what I really want to speak to first is Justice Taylor's question about the warehouse. But I want to respond also to criticism I heard from certain representatives of the Court of Appeals who are criticizing the bar. May experienced appellate practitioners are in the gallery here today. We're not stepping up to the plate. I think Chief Judge Whitbeck has made a very effective political argument. The Court of Appeals stepped up to the plate, the Legislature has stepped up to the plate, the lawyers are sitting it out. And it's an indefensible position. And some of the judges of the Court of Appeals have said we can't believe you haven't offered to compromise. Well the problem is that that entire argument ignores the realities of the situation. And the realities of the situation are that the Court of Appeals has the warehouse. It still has the warehouse. The warehouse was 271 days at the beginning of their delay reduction process. The court has made efforts to reduce the delay but it's still approximately 230 days. Chief Judge Whitbeck issued a letter that he sent to Scott Brinkmeyer, new president of the State Bar, dated September 22. I read from footnote 2 on page, I think it's 5, where the Chief Judge says and I quote: "I note that it will never be possible to completely eliminate the warehouse. There will always be some time,

however minimal, required to move cases from the clerk's office at the conclusion of the intake phase, to either the research division or the judicial chambers directly. Further, although we received additional funding for fiscal year 2004, this funding will not be sufficient for us to hire and maintain the full compliment of research division staff necessary to completely eliminate the warehouse." Now, Justice Young, you've talked about the ABA standards. It's my understanding actually that the ABA departed in the last decade from a fixed ironclad 12-month target to a more each state must find its own balance. Each state must find its own. It's still, I guess, a goal. I have asked the chief judge of the Court of Appeals is your goal something different than 18 months and the answer has been no. So the reality of the situation is that the Court of Appeals has a warehouse. With their original funding request to the Legislature they projected that they would try and eliminate the warehouse by September of next year. Now we hear that because they didn't get quite enough funding, which our section supported, they're not going to be able to do it at all. And so what you're doing is you're asking the bar to give up our briefing time, affect the quality of our lives, affect the quality of our work product and our ability to represent our clients, just so we can hurry up and wait while the court is still isn't going to be able to process cases quickly enough because the warehouse is still going to be there.

JUSTICE CORRIGAN: Mr. Fulkerson I need to interrupt you and I am grateful in my role, doing the budget, to have had the support of you, the section, the bar, with regard to the court's needs. I know Chief Judge Whitebeck is equally grateful for all of that. The concerns are out here. And the hurry up and wait argument is a very powerful argument but if, look at the differentiated case management piece of it, you still oppose filing the brief at the time the warehouse is ready to take you. You did oppose that notion a few years ago. Can I make that clear. Just in time inventory did deal with the problem of the warehouse and saying we'll take your brief when you're ready for it and the bar opposed that several years ago. And I'm wondering now, you know, this is like catch-22, you can never make an argument that will do anything to time limits that affect lawyers that lawyers will be accepting of. I want to know why is differentiated case management the wrong solution.

MR. FULKERSON: Well first of all, Your Honor, I respectfully disagree that I and others are being either hypocritical or inconsistent.

JUSTICE CORRIGAN: I am not saying you're hypocritical. I'm saying it's an inconsistent position here. I'm not making a personal accusation now.

MR. FULKERSON: I know that. Let me respond to that. The briefing schedule proposal that you came out with when you were chief judge of the Court of Appeals was analogous, for example, to the 6th Circuit, the D.C. Circuit actually, was your model.

JUSTICE CORRIGAN: It was the D.C. Circuit proposal.

MR. FULKERSON: Our opposition to the proposal was not the principle that stale briefs are bad. We agreed with that. But we viewed the proposal as inflexible. That you were going to be setting a date in stone and still there wouldn't be the opportunity for at least some flexibility of practice, is what you're hearing, especially from Jim Gross, is necessary. When Scott Brinkmeyer and Jim Neuhard, Mary Masterson-Ross, Tim McMorrell and I joined the chief judge, Sandy and Larry, over the summer in the delay intake committee, we went into it in good faith thinking well let's look and see if we can develop not a drop-dead draconian cliff of an ironclad briefing time down the road, but a differentiation where you have a schedule for summary dispositions, for example. A schedule for bench trials in criminal cases. That's something we're still willing to look at. But when we got into the process over the summer we hired our own consultants who were Ann Vrooman and Jim McComb, former state court administrative office people, very qualified, the Court of Appeals cooperated with us, we looked at the statistics. First of all we found that this adieu is over 6% of all cases. That if the warehouse was eliminated we're only looking at 6% of the remaining cases to meet the chief judge's goal. We recognized very early in the process that record and transcript production formed a huge component of delay or potential delay in intake. That's why you and the chief judge formed the record production group, which I also reluctantly joined because I felt I had to, and we've already looked and I can tell you a couple things. That in one third of all Court of Appeals cases there is a delay in transmission of the circuit court record. One third. I think most of it is in the Wayne Circuit. In 50% of all cases that are disposed of in more than 18 months the transcript is late and in half of those it's more than 100 days late.

JUSTICE YOUNG: Mr. Fulkerson, I'm fully aware of the problems of delays occasioned mostly in Wayne County, of the production of transcripts and records. I think you made a very compelling argument that this is a multi-headed hydra. The question I have is the bar unwilling, until all the other heads are severed, to offer up some kind of proposal, not opposition to changing the current system, but some kind of proposal that recognizes that there is delay associated with brief writing.

MR. FULKERSON: I am opposed to offering up an imprecise proposal, one, while the Court of Appeals is still trying to eliminate the warehouse and there's no need for it, what's the rush. That's my response to your question Justice Young. Why are we rushing to do this when we have a year, and the record production work group has just started and it hasn't even issued its recommendations yet. We don't even know yet if that 6% can be reached, that additional 6% to reach the 95% case disposition, by reasonable reforms in record and transcript production. If I am convinced through statistics and through new proposals that it cannot be reached and that we have to go back to the bar I'm willing to compromise. I'm willing to look at additional issues. My major point is I just don't understand why in September of 2003 we're rushing to put the cart before the horse and ask the bar to give up time in briefing when it may be unnecessary or substantially unnecessary. I know I've used a lot of time and I really appreciate it.

JUSTICE MARKMAN: Will you just share with the Court your estimate of when the recommendations will be adopted and actually take effect. What is your timetable for that?

MR. FULKERSON: You mean in the record productions work group? Judge Smolenski chairs the work group. We're hoping, based upon what Judge Smolenski said in our first meeting which I think was the third of September, we're hoping to complete the work of the committee by years end. We're not looking at a long process. I can't say for sure but I know that Judge Smolenski has asked us to work quickly.

JUSTICE MARKMAN: And the recommendations will be adopted when, and implemented when?

MR. FULKERSON: That's another question.

JUSTICE CORRIGAN: That's a report coming to the Supreme Court.

MR. FULKERSON: I believe that, based upon what Judge Smolenski has told us and that is we need to work fast, I think the record production work group should be able to issue its findings by the end of the year. Maybe sooner but somewhere around there. Now implementation is an issue and I know that the chief judge is going to talk about the fee increases for court reporters which is desperately needed but the counties are opposing it, but that still doesn't speak to the fact that we don't even know yet the picture of what is causing intake, let's look at it and let's see what really is needed. I wanted to also answer your question about Ohio and I guess I'm out of time and I know that Jim Neuhard is going to speak to that.

JUSTICE CORRIGAN: Why don't you write us a letter about Ohio if you have information, just a follow-up letter.

MR. FULKERSON: Thank you very much.

JUSTICE CORRIGAN: Mr. Baughman.

MR. BAUGHMAN: Good morning, Your Honors. Tim Baughman from Wayne County. The point I wish to make is to point out that I believe that the criminal appeals are in a very real sense su ejeneris. And that is because for both sides, particularly the state side, but also the defense side, they're institutional. And by that I mean public funds drive almost all criminal appeals. They certainly do from the state side and virtually all of the appeals from the state side too because most involve appointed counsel with indigent defendants. And that means the resources that are available are driven by the public monies that the allocating bodies, the counties and the state, are willing to expend. As Chief Judge Whitbeck has said repeatedly, in order to get the warehouse down, they needed more resources. They needed to get more prehearing clerks and commissioners to deal with that. The court didn't just say, and was very wise not to just

say to prehearing, you have to produce the reports in half the time. You can't tell these publicly funded institutions, unless they get more resources you have to do it in less time, and I'm here to tell you the resources are not coming. Wayne County just cut the prosecutors budget by well over $3 million. And that's not going to be felt primarily where bodies have to be in courtrooms. It's going to be felt in places like appeals where you can wait. You don't have a judge saying somebody gets here right now or somebody goes to jail. So unless we get more money expended on both sides you just can't say like Star Trek, the Next Generation, make it so. We have less time, make it so. You can cut the time. We won't file the briefs faster. You'll still get them the same time. They'll just be late. We already, as Anica indicated, don't file motions to extend anymore because they now charge us a motion fee which just went up.

JUSTICE CAVANAGH: How about the quality.

MR. BAUGHMAN: We'll have a choice to make. We're already having to make it. We will either try to do all the briefs with the same quality, which would be my preference, and cease doing some things that we ought to do. We might have to say if the sentence was probation or 5 years or less we just won't file a brief, and put more work on the court that's really our work. We do have some already, which as the head of the department I find it unprofessional and very troubling that we don't answer guilty plea applications. We don't answer any pro per applications. That's not really professional. But we have to make that choice. That choice may escalate to sentences under a certain amount we just won't answer and let the Court do our work for us and try to do a quality job on the cases with bigger sentences. If we have to make a choice that would be mine. The other choice would be to skimp, to try to do everything and do an inferior job on everything.

JUSTICE CORRIGAN: Mr. Baughman, I was fascinated by your proposal in your March 30 letter that's on page 6 of the 10 pages that you submitted, regarding proposals that you have for change. I did not in my review of the material see comments from other criminal practitioners on the proposals that you made. Are you participating in Judge Smolenski's record production work group at all?

MR. BAUGHMAN: No, I'm not.

JUSTICE CORRIGAN: I would hope or I would invite comments on the suggestions that you've made in your letter because I think they're very worthwhile.

MR. BAUGHMAN: And I do have to point out that the comments and suggestions I made were in part to try to limit possible damage that I saw coming in terms of our ability to respond and mitigate--

JUSTICE CORRIGAN: I appreciate that you've made proposals that do shoulder the lawyers' burden in this in saying we're all in this together, we're all facing

reduced resources, we all have expectations on us, but your proposal does at least attempt to say here's what could be done in all these different areas.

MR. BAUGHMAN: I just wanted to emphasize, as I said in the letter, that if an intermediate ground were adopted I'm not suggesting that as currently staffed we could meet that but it would be better than what has been suggested. I think critically important just the transcript production, I tell people in my office that the most powerful people in the system are the court reporters. And I'm not criticizing all court reporters. I had a prosecution appeal recently with a short transcript. I got it in 6 months. And that's not uncommon. So there's huge delays there and I think around the edges not insignificant reductions can be made by little things like do we need 42 days for a claim. Can we do 28. Get the transcript--

JUSTICE CORRIGAN: And actually the federal rule is 10 days for filing the Notice of Appeal. 28 is--

MR. BAUGHMAN: I know Terry Flanagan didn't mention it but I talked to him and I didn't even know, in Wayne County and I suspect elsewhere there are huge delays that probably don't even get factored into the account because the claim hasn't been filed yet where the defendant makes a request for appointment of counsel. The judge has 14 days under rule. That takes weeks and weeks actually. There's a huge delay that's hidden there that I think needs to be addressed as well. So I do believe in the holistic approach but I'm just saying with publicly funded institutions even small reductions on the briefing schedules may simply mean you're not going to get them any faster, you're not going to reduce delay, you're going to eliminate more oral arguments but the briefs will come in at the same time.

JUSTICE CORRIGAN: Okay, any questions, comments? Thank you. Daniel Levy.

MR. LEVY: Good morning, Daniel Levy on behalf of the Representative Assembly of the State Bar of Michigan and in response to a vote of the assembly that took place on September 12. It was the assembly's feeling that reducing delay was a very laudable goal and was something we should all be pursuing but we took some issue with the question of what delay is defined as and who should be making that decision. We don't anticipate that if this goal of 95% of cases in 180 days is met that Judge Whitbeck is going to go around the state proclaiming we're doing a good job, we've cut more cases, we only delay it 180 days now. There is time that is necessary for justice and there is delay and they shouldn't be grouped together. The question isn't whether it's our turn to be cutting the delay; attorneys should be trying to cut the delay right away. But the question is what's delay and the Assembly believes it should be defined as that which is not in the client's interest or that which the client would not consent to. I couldn't help but thinking when Justice Markman asked his question about whether the tenor would be different if clients were to be testifying instead of lawyers. I think my response to that

question is I would hope that I wouldn't become particularly wealthy if I just hung up a sign in front of my office that said quickest lawyer east of the Mississippi. That's not necessarily what the client is looking for. The testimony is, and I don't think there's any reason to dispute it, that in some cases the clients would be willing to agree to more time, more than 100 days, more than 200 days, it should be the clients that are involved, or as close to the clients as is possible that are involved in deciding what delay is. At the moment the closest you can get is the attorney who is representing them. We should be doing everything we can to change the culture that treats a due date as a filing date and encouraging attorneys across the board to understand that it's in their client's interest to get that brief in as quick as is possible, not on the due date. But imposing an arbitrary due date and telling the client, telling the litigant, telling the person who's in the court looking for justice that we don't care if you want more time, if you're willing to stipulate to more time so that your lawyers can do a better job on your behalf, that's not our concern. In your name we say speed is more important. And that's something that this rule is doing. I had much to say about why quality would suffer. Most of it has already been said. The other point I want to say that has not been mentioned is that there's a real disconnect in the argument because the Court of Appeals and the guidelines and the ABA and everything else talks about averages. The Court of Appeals is now saying we have cut our in-chambers time to an average of 30 days. But what they're saying to lawyers is we want to give you a drop-dead date of 30 days. And if we said to the Court of Appeals you have to get all cases out in 30 days, 50% of them would be late.

JUSTICE YOUNG: Mr. Levy, what do you have to say about differentiated intake case management. That does allow differentiation in averaging.

MR. LEVY: First off I would say that I wasn't involved when it was --

JUSTICE YOUNG: I'm not assigning a (inaudible), I'm just asking the question.

MR. LEVY: And I think it should be on the table again now regardless but again I would say that while it's an effective management tool, the ultimate decision should still be in the client's interest and if it's even just I want that attorney and that attorney has a vacation scheduled, I'm willing to wait until he comes back from Europe after 5 weeks until he writes my brief, and the other side says that's okay, we shouldn't be saying that's not okay.

JUSTICE TAYLOR: So you're effectively saying we should not pay any heed to the ABA standard.

MR. LEVY: I'm saying it's an effective management tool, it's a standard that we should look to, but at the same time, if we want to shorten delay and we think the clients don't--my theory is that the number one reason given by the Court of Appeals in

all the reports for meeting delay is the public perception that the delay is harmful to them. And I'm afraid we're going to trade that perception for a reality.

JUSTICE TAYLOR: Do you think the Bar is prepared to take a public position that delay is no big deal.

MR. LEVY: No, I think the Bar is prepared to take a position that says that if the client wants--

JUSTICE TAYLOR: You want the courts to take that position but the Bar will hang back.

MR. LEVY: No, I think the Bar will take the position that it should be the litigants who decide.

JUSTICE TAYLOR: You want it to be in the control of the litigants. That isn't an unreasonable position. But there's a clamor to reduce delay and so you want the courts to say we're not going to reduce delay if indeed the people who are being delayed aren't unhappy about being delayed.

MR. LEVY: What I'm suggesting is that we find a way to involve the litigants in the process of determining what's an appropriate amount of time for their attorney to do it, and that's not delay.

JUSTICE TAYLOR: I just wonder if the very statement you've made here, this should be in the hands of the litigants, you would be prepared to make publicly on behalf of the represented assembly.

MR. LEVY: I believe Assembly has in fact said that so in general terms yes.

JUSTICE MARKMAN: Mr. Levy, I think Justice Taylor raised a very interesting question and I think it's very provocative and I'm not saying you're wrong in any particular respect or anyone is right, but you are suggesting that this ought to be a matter purely a voluntary agreement. Kind of like a contract between the parties. If they're willing to live with it, who has standing outside those parties to complain. And I guess my question to you is once a case has been initiated, once it has been introduced into the legal system, is there some fairly described public interest in moving the case more expeditiously. Is there an independent public interest apart form the interest of the parties that suggests that we ought to be moving that case more expeditiously.

MR. LEVY: I would respond that yes there is.

JUSTICE MARKMAN: What is that public interest.

MR. LEVY: The public interest is that if the Court of Appeals or the Supreme Court's opinions are to be precedent they have to be issued and that undecided cases don't set precedent.

JUSTICE MARKMAN: But what's the difference if they're issued in 180 days or 150 days, what's the public interest in that, or is there a public interest.

MR. LEVY: It's 30 days more that the trial court doesn't know the answer. So yes, I would say that there is an interest, but I'm not suggesting that there can be no deadlines or that this is an infinite process, but what I'm saying is that the system now provides a single extension by consent of the parties and doing away with that at the expense of the clients is not the appropriate response. If we're going to shorten that time, require the clients to be involved in whether or not that's going to be granted.

JUSTICE MARKMAN: How do we weigh the public interest and the private interest that you've articulated here well today.

MR. LEVY: I think the present system of a set period of time that can be extended once by consent of the parties before the court gets involved is an appropriate one. After that the Court is involved. But that first extension we have said to the parties if you in your own interests want that time we're not going to tell you you can't have it. We're not going to go forever, we're not going to extend that indefinitely. You only get one. But if you in your interest, in the interest of getting that case, as was pointed out before and Justice Grant said it in 1916, a judge rarely performs his functions adequately unless the case before him is adequately presented. That's the interest to the public. That's the interest to that litigant, is to make sure the case is adequately presented and they should have the right to be involved in saying I want this lawyer who may not have time to get it in 30 days or 45 days or 50 days. I'm willing to wait those couple extra months, I'm willing to wait that extra time, and we shouldn't call it delay.

JUSTICE YOUNG: You want one size fits all at the outer margin. You're unwilling, or are you, to consider that cases can be disaggregated so that the box cases get longer time and the garden variety cases get less time.

MR. LEVY: Personally I'm prepared to say that. At the Assembly it wasn't presented. I don't know that I can speak for them. But again, if we could impose on lawyers an average time for briefing, it would be a very different animal. The courts get to talk in terms of we will take an average period of time on a brief, and recognize that some are going to take a lot longer than that. To the lawyers if we're going to set a drop dead date it's got to be that longer date because that's the case that's going to be affected and those are the litigants whose interests we should be thinking about.

JUSTICE CORRIGAN: Thank you Mr. Levy. Scott Brinkmeyer.

MR. BRINKMEYER: Good morning Madam Chief Justice, Justices of the Supreme Court. I'm going to try to address a number of the questions that have been asked because your questions have indicated, I think, where your concerns lie. Let me talk first about the ABA. As I recall my reading of the ABA standard as it has been referred to, I do believe that that report did suggest that that's nothing more than a guideline now to be used and applied given the circumstances of the particular state. And indeed that seems to be what you have done in your discussions with the Legislature is to depart from 12 and to look instead to 18 months.

JUSTICE CORRIGAN: Are you aware of a later study than the ABA study to which all of us are referring. Mr. Fulkerson alluded to a later study. And I'm not familiar with such as study.

MR. BRINKMEYER: I don't recall the exact year of the most recent publication. We looked at, in our subcommittee, at least two studies of the ABA and we can certainly get those dates for you but in any event one thing was also very important that has not happened here and that is the ABA recommended that when you begin to study whatever it is you're going to do in light of that standard, all of the vested parties should be at the table and you should have the benefit of all their experience and their recommendations in making a decision of what is right for your state and therefore what is right for the litigants. And I know that Chief Judge Whitbeck agrees with me because we have discussed it, that the system here is for the litigants. Not the lawyers, and not the judges, but the litigants. Justice Markman, you asked how do we balance this, how do we make our decision. You make the best decision you can make in your judgment once you have all of the information and data that is appropriate to and necessary to make that decision. It is clear from your questions that you don't yet have that. I don't feel that we yet have that. And the problem is that we have been backing up from day one, since the spring of 2001 at the Bar, in effect trying to hit somewhat of a moving target because all of the players were not at the table and they only finally are getting there.

JUSTICE TAYLOR: Mr. Brinkmeyer, the history of this I believe has been that the lawyers, no matter what the proposal is, say not one minute off of our time frame. So the question is, if such an all players at the table thing were arranged, why would there be any belief that the lawyers, maybe not you, but the representative assembly, tell them we're going to take one minute off your briefing. No. There's sort of an irresponsibility it seems to me, by the Bar on this. Either you ought to say look don't pay attention to the ABA, we're doing fine here, or you want to say the ABA has something and here's what we're prepared to do. Do the differentiated case management, do some other thing. But that never comes from the Bar.

MR. BRINKMEYER: Let me answer that in this way. First of all, since we weren't at the table to begin with we don't know the answer as to whether or not a shortening of intake is even necessary. But I think you have to ask another question and that is at the intake side are we talking about delay or are we talking about what is

necessary to do the best job for the client. At some point in history someone, presumably the Supreme Court, decided that the rules we have are appropriate and were necessary in order to appropriately represent clients, to brief the cases and get the best possible product to the Supreme Court. Now we're supposed to say no they were wrong because of an arbitrary standard that even the ABA says should be applied given the exigencies of the particular state. Now when we convened our subcommittee this spring, one of the first things that came up in that subcommittee and which Chief Judge Whitbeck agreed to and still agrees in his letter of yesterday to me to look at is a differentiated case management system. I was not involved in that process and I've asked those that are here today from the State Bar, did we take the position on the Bar as that and I don't know the answer. You may, Chief Justice.

JUSTICE YOUNG: Your appellate section did.

MR. BRINKMEYER: And again, I did not weigh in on that, I'm not a member of the appellate practice section but it occurred to me--

JUSTICE TAYLOR: You're saying that now that death is imminent, dismemberment may seem more attractive, is that the argument?

MR. BRINKMEYER: In any event--

JUSTICE YOUNG: Well it is something of a moving target here. Yes, I understand there's a difference between sections of the bar and the bar through its duly constituted structure. But there has been continuous participation with various levels and segments within the bar. It's been a contradictory process at least to my involvement in the judiciary going back to Chief Justice Corrigan's chief period on the Court of Appeals. Lawyers have had lots of opportunities and they all, to my recollection, have been singular in one respect. And that is, there is an implacable hostility to the notion that there's any give that can be made on how this current rule about briefing schedules is arrayed.

MR. BRINKMEYER: And I'm not surprised.

JUSTICE YOUNG: Oh, I'm not either.

MR. BRINKMEYER: To me, I think that is a reaction that would be normal and to be expected.

JUSTICE YOUNG: But it isn't very helpful.

MR. BRINKMEYER: It isn't at this stage but one of the reasons why it's not is that the way I think you deserve to make your decision is to have all of that information and data before you. For example, you asked, what do we have from other

states. There is some information that has been presented by the Court of Appeals. Frankly we have not had the time and the opportunity, we've

JUSTICE YOUNG: Who is "we". That's what I'm challenging on. One of your sections has been actively involved in this for years. You may choose to divide your cerebrum so that you do not know what your sections are doing but I don't have to accept the fact that you're saying I don't know what's going on.

MR. BRINKMEYER: I shouldn't say I don't know what's going on.

JUSTICE YOUNG: Well, we don't have all the data. There are members of the State Bar sections that have been involved. And what I'm really very concerned about is this notion that the reaction, and it's not just this, it's not just the bar, is that when a proposal or an issue is raised, the reaction is kill it, do not acknowledge whether it's a problem or not, and offer no solutions.

MR. BRINKMEYER: The problem with trying to offer you a solution now is that I think it is premature because we do not have, for example, the weigh-in of the very work group that you've just put together. What our--

JUSTICE YOUNG: I happen to agree that the advent of this group to study the front end process is highly relevant to how to balance all this. Have you got a proposal for how we should move forward?

MR. BRINKMEYER: Yes I do. Here is what I would suggest. I would suggest that you not take a position on those particular items--and remember, we've supported about 98% of everything the Court of Appeals has asked for and went to the Legislature with them to try and get the finances, which they now have. We were told by the way, and this is important, when we made that effort we were told and that was repeated to me as recently as July 17 in a letter from Judge Whitbeck, that with those funds they expected beginning in September of 04 to eliminate the warehouse. Now my submission is the right way to do this is the right way and that is to have that information. One, do not make a decision now. Two, allow that group to weigh in. Three, allow our committee to keep up our work studying both the statistics, the implication and effects of what the task force has proposed, many of which have been implemented. When we get that information and we have the benefit of at least--and we should by then--about a year's operations of this system, have the court tell us where the warehouse is, whether or not it can be eliminated and at the same time we will be working on a proposal for a differentiated case management system. I can't offer you, Justice Young, today a compromise when I don't know what that compromise should be. And I would like to be informed before I go to any party in any setting as to where the propriety lies for my client. Because here when I speak for the members of the State Bar, I'm speaking for their clients, the litigants. There is no one else going to stand up here as you asked and speak for them. What do they deserve out of this. The absolute best they can get for their money

or the best they can get for what the state gives them. And you're heard from people in that position today. The right decision is the one that ends up at that point. I can't offer you a compromise today because I don't know. Should it be a shorter stipulation? Should it be 7 days or 14. Until I know what this means and what the recommendations are as to these transcripts and records which are a big part of this problem, I don't know. On the differentiated case management that just came up recently this spring.

JUSTICE YOUNG: No, not true.

MR. BRINKMEYER: I don't mean for the first time. Bad choice of terms. It came back this spring, and Judge Whitbeck not only indicated his willingness to look at it, but indicated that again yesterday in his letter and I think you've seen that. Both of us want to work on that. That could be another way of handling this delay without imposing the burden on litigants and one other thing that cost, that is pretty significant because when you think that 52% of the people that are filing appeals utilize the stipulation, even if Judge Whitbeck is right and a certain percentage of those people don't file, for whatever reasons the motions, the increase in cost to the litigants is going to be truly substantial but you can't possibly think that it's not going to in turn right around and extend time. If you cut it out on the briefing time and now you say you've got to file motions which will have to be briefed and submitted and heard, now you've immediately added back in some as yet unknown period of time for presumably all the motions, however many up to 52% will have to be filed and paid for, to determine whether or not there is good cause for a professional seeking a delay of his or her case. Thank you.

JUSTICE MARKMAN: President Brinkmeyer, very delighted to have you here today. You wrote very recently a letter to the editor to the Detroit News on this subject and I realize that letters to the editor are not legal briefs and one has to summarize but you stated in there that the current rules now allot less than 2 months from the time when an appeal is filed and ending with the filing of briefs. Can I assume that was a typo?

MR. BRINKMEYER: Yes.

JUSTICE CORRIGAN: Jim Neuhard.

MR. NEUHARD: Thank you, Your Honor. I have several points to make. The ABA study that's being referred to as revised in 1994, is Section 3.52, standards of time of disposition of appellate cases. And that's the one that talks about these goals are not intended to become rules for the appellate courts. They function as time standards to establish a method of assessing whether these rules and procedures are successful. And they go on to discuss the collective effort of everybody sitting down at the table and trying to come up with methods to set targets. And they do recommend differential case management as a method to do that because one size doesn't fit all. And I think that's the approach we're taking. Differential case management has two concepts. One is to identify

a case when it comes in the door by the type of case it is that it deserves before you know what's in it. The second deals with after it comes in and you realize it's a different type of case. That is it's a first degree murder case with a 5-week trial, things that can happen as the case progresses on and treating those differently, which is transcript length. One of the key things on the criminal side that determines the amount of time we take is transcript length. But frequently we don't have any clue of what that's going to be until the record walks in the door. Right now the counties don't track that. We may see there are five reporters on a transcript, five days of trial, because you know that can be a huge difference of a half day versus a full day, etc. So waiting is important to do and it will assist it, and you have to take some time to look through the types of cases. We simply lacked the time this summer to get into that in great detail but I think there's a lot of promise in that for creating different tracks of cases that will reduce the overall average of cases. Another point I want to make is a chart I've done that shows--I think it's true for civil but it's particularly true in criminal, and it's really irrelevant what the numbers are but they show you want happens when our clocks start running and this applies both for assignments to the prosecutor and to us, and to the due dates that are created by a transcript being filed. The differences here are from 230 to 380 transcripts in one month. 150 that start a clock running when they walk in the door. We have 18 lawyers, for example, and you've got to absorb that kind of massive percentage that walks in the door and starts a clock running on your cases. We don't control that.

JUSTICE CORRIGAN: I don't know what 230 and 380 are referring to.

MR. NEUHARD: These are the numbers of criminal assignments made in one month. And then of course a transcript will come in an unpredictable amount of time downstream. But as a practical we're going to have months with that kind of differential in terms of the work walking in the front door that starts a clock running. The same thing is true in a remand, which is much different in our state than any other state. We're the only state that has a duty to investigate as part of the direct appeal, off-record issues. In other states you finish the direct record appeal, then you start that process after the initial appeal, which add years onto the timing date. One of the great reforms Michigan made was to include those as part of the direct appeal so that when it's over, it's over. And we now recognize in 6.500 motions that if you don't raise all issues you could have raised on the direct appeal, it's gone. So our cases have a closure rate that is far faster in aggregate than any other state in the union. So what we have to do in that time period from when that transcript walks in the door, we have to visit our client. Because unlike most other states we have no trial defender system. We're new to the case. There is no record that we can get from the trial bar, they destroy them generally and won't even give them to us. So we've got to start afresh with the case from when that transcript walks in, to visit the client for both record and non-record issues, and then begin to investigate if necessary--we don't know if it will be there or not--and then do the record issues. But we have an open active caseload of 50-70 cases in which we call it rainfalls, in which orals are set, remands are granted--in 12% of our cases they're granted, trial cases. These dates start

new clocks running if you have an open active caseload. It's not just one case we're dealing with. Professional lawyers have many cases we're dealing with and these clocks are running. While we're trying the best briefing schedule we set up, we get leave granted. When the prosecutor files a petition for cert. These things happen to us while you're on the way to do something else. And while we use this time, we don't take 112 days to do every brief, it's that you set your time out and then other things happen within it. We move our time around accordingly. And a stipulation is different than an extension in a very critical way. We can file an extension, yes. It may or may not be granted. But if we file a stip at the last minute we know it will be granted. We know we've got that additional 28 days to be timely to get oral argument, because unlike other states we remove oral arguments if we're not timely. So the stip is a very valuable last minute tool for high-volume professional lawyers. To be able to know we're going to get that stip if we use it. But only 52% of the time are they used. Not in every case. We just don't know what's going to happen so those 112 days we're talking about for us who carry 50-70 open active cases, we move our time around in there depending on what is going to happen in this case and what's going to happen in our other case loads. It's essential to us to be able to move the work around and carry a high volume of cases. Can we do it quicker? Yes. It means we'll do fewer cases that's all. Now at the private bar, these people can't afford to be a viable, professional appellate practitioners. They just can't get enough work, or they've got to charge their clients a lot more money. That's one consequence. For us and the prosecutors, can we meet these timely dates? Sure. You heard what Tim Baughman said. We can reduce our caseloads down to 5, 10, 15 cases, depending on what it might be. The cost to the taxpayers is staggering and you have to weigh that against what the gains are. Are we going to get the resources we need. My commission passed a resolution last week unanimously saying the answer to that is no. We can't match up our caseloads today with what the future workload is going to be. You just have to look at that chart. They never match up. So we're constantly in a struggle to match our resources to our capacity. The intake to our capacity. That's the reality which we face. And if you want a professional bar which the Court of Appeals and everybody agrees is a highly desirable thing and what we have in this state that nobody else has, then we've got to have this flexibility. And I don't think it's too much to ask to give this kind of flexibility to the professional bar. The final point I want to make is the outlyer cases. When you look at the cases that are beyond the 18 months, they are troublesome cases, not just in being box cases but if you look at Wayne County I'll give you an example. 200 orders of appointment were found in this file drawer when they had the retirements. They found 200 cases because they couldn't find the case file, they didn't issue an order of appointment. If the file didn't exist, the case didn't exist. All these cases have been sitting now for hundreds and hundreds of days, some of them almost a year and a half without a lawyer on them, without anything happening. Now lawyers are assigned. They're automatically late. Transcripts in Wayne County, court records in Wayne County, we can't get them. So these outlyer cases unbelievably have these incredible problems in them that are driving the records up but if you look at what we've done over the last 20 years, and all of you were on the Court of Appeals. We used to be able to get unlimited

extensions of time. I mean literally we took the time it took to do the case, both in the Supreme Court and in the Court of Appeals. So it's not that the bar hasn't responded. We're down to 56 days in the Supreme Court when we use to have 1 1/2-2 years to file up here. We're down to in the Court of Appeals 112 days from when we used to be, when I was handling cases, 18 months wasn't unusual to get an extension of time to file cases. So we have chopped the time down. But we do have a professional bar and we are very different criminally from other states. The final point I want to make is other states. The ABA is conducting a survey at my request of all the states in the criminal area about what their filing requirements are. I will be happy to share it with you, they are sending it out probably within the next month. Unfortunately it will take some time to compile it but I would be happy to let the Court add any questions they want to it to ask of other states and we'll put that in there so we can get valuable information to compare apples to apples from here to other states and I think that will prove valuable. I can tell you that in states such as Florida, Oklahoma and Illinois, lawsuits have been filed because of delays of over 5 years in filing cases. Cases under 5 years weren't even getting briefs filed by parties.

JUSTICE CORRIGAN: Your time is up, Mr. Neuhard. Are there any questions?

JUSTICE KELLY: What was the end of your sentence?

MR. NEUHARD: I was going to say that every state is struggling with the issue of resources and the workload and in some cases the way they've solved it is they just don't file briefs for 5 years. The cases don't come in the office, they sit in their warehouse before they're assigned to lawyers in the system. And it's a 5-year weight. So it depends on where you're measuring from in terms of how much time things take. Each state is a little bit different.

JUSTICE CORRIGAN: Thank you. Charles Sherman Sr.

MR. SHERMAN: Good morning, Your Honors. I'm here as president of the Prosecuting Attorneys Association. I'm the prosecuting attorney for Clinton County. I'd like to praise Judge Whitbeck for the efforts that he has made so far. We believe that delay reduction is an important goal, particularly in the criminal side of things. One of the most miserable things you can do is to retry a criminal case 4 or 5 years after it's taken place because it's been reversed on appeal. And we believe it is also unfair for a defendant to sit in jail or prison when he may be innocent. So we think delay reduction is a goal that needs to be sought after. Our position is very specifically an objection in this proposal to eliminating the 28 day stipulation for extension. You've already heard talk about how prosecutors' offices have money no more for filing motions so the traditional 28-ay motion for extension is already out the window. So we're really looking at our 35 days plus our 28-day extension, our 63 days that we currently have since we can't file motions. If that's reduced to 35 days we believe that it's something that simply will never

be met. You will not get a brief on a criminal case filed within 35 days. The consequence of that is elimination of oral argument which is something that I don't think anybody wants to see. Tim Baughman has made a proposal that we believe is something that the Court should strongly consider. It addresses differentiated cases at the transcript preparation level which I think is really a place where it needs to be addressed. If a transcript is over 1000 pages, perhaps more time should be given than if it's under 1000 pages. But to talk about time for preparing the brief, I don't know how easy that would be. A one-day bench trial can pose significant legal issues. On the other hand I recently did a 2-week long murder trial with a second degree verdict and the only issue on appeal is sentence. So I don't know how you define the different cases in a differentiated case system. You asked us to try to make points that hadn't been made before. While I was looking at these materials last night the one thing that jumped out at me is that under Judge Whitbeck's proposal, his objective, if all their objectives are met he is proposing giving 61 days to the research attorney to do his preparation work before it's submitted to the panel, which I think is appropriate. But I think it's improper to say a research attorney should have 61 days to take the issues that have already been presented and researched and put them together for the court, but the party who is responsible for researching his issue and preparing his argument for the court, in my case the appellee in a criminal case, only has 35 days. If we eliminated the 28-day stipulation and left it at 35 days which the current proposal is, we're given almost half the time that the research attorney has to do his work. And if we simply go back to allowing the 28-day extension we already know that motions aren't going to be filed because of financial reasons, but that puts us back at 63 days which is in the same ballpark that the research attorney is given. I think we need to be given at least the same amount of time that a research attorney is given. I'd be happy to answer any questions.

JUSTICE CORRIGAN: Thank you Mr. Sherman. Chief Judge Whitbeck.

JUDGE WHITBECK: May it please the Court, it's been awhile since I've done this, so if I'm a little awkward on this side you can perhaps sympathize with me. I am not going to attempt to rebut every point made by the previous speakers. You've probably heard enough about this this morning and it's not in the interest, particularly in 3 minutes, of you or me to try to do that. So I'll just make about 4 points and I'll make them rather quickly and quite candidly I'll make them rather bluntly. First, I view the position of the State Bar as follows. We support everything the Court of Appeals is doing, everything the court has done with respect to reducing time in the chambers, reducing time in the warehouse, everything the court has done the court has done with your help, in the Legislature, but when it comes to our situation, not one day. And that position is not a new position, as you all have pointed out. When we embarked on this effort over 18 months ago, I reviewed everything I could get my hands on. National studies, etc., the ABA standards, (inaudible), and I reviewed every piece of correspondence about differentiated case management. At the conclusion of my review, the comments filed on that proposal by some who have spoken today, I reached the conclusion this was a non-

starter with the State Bar. That they had made their position clear and they were going nowhere on this proposal. And that position has not changed from that time to this. I am certainly willing to continue to explore it with the State Bar in addition to, but not in lieu of the proposals that we've made today. About 4 or 5 arguments have been made that the proposed changes are unnecessary, they're misdirected, that they're premature and that they will affect the quality of the briefing. I think I have attempted to respond to every one of those in the letter that I filed with you the other day. I would just like to make two points. A, that the proposals are misdirected. I heard Mr. Fulkerson, my good friend, say that the Court of Appeals is now saying they will not be able to reduce the warehouse at all. That is totally wrong. We have achieved significant additional resources, significant to us, to hire about 7 additional attorneys. We're going to drastically reduce the warehouse. What I did say was we didn't get all of what we asked for and there will always be some limited time involved. So that warehouse is probably going to sit there for awhile at a much reduced level, but we will substantially, drastically reduce the warehouse. It is simply a question of numbers, of resources, as we have the additional resources necessary to accomplish that. That the changes are unnecessary. I must say that until the last speaker I heard no one, and fascinatingly it was a prosecutor, raise the following issue. What about a criminal defendant who has been convicted and has filed his or her appeal of right with our court. His or her. Most often his in our society. What about that criminal defendant. And I must tell you, my record, I think, shows that I am not one who often votes to reverse criminal convictions. But if there is anyone in this system for whom, as a client, delay is the worst possible thing is a criminal defendant. That person is in jail and he is sitting in jail for over a year and a half while his appeal gets processed before our court. I do not know in good conscience how one can say that proposals to reduce that time are contrary to that client's interest. I can't grasp the idea. Third point. Obviously the centerpiece of our proposal is to eliminate the stipulated extensions of time. 28 days on the appellate side, 27 days in the appellee's side. 56 days in total. Though the court in Michigan is I think approaching such a system, there are few courts in the United States we've been able to discern, have anything approaching such a system even with substantially lower times to file the briefs. So this thing sort of sits out there as a sore thumb. And I submit to you it is not just a question of delay reduction. It is a question of who is responsible for controlling the system. As Justice Taylor pointed out, once a litigant files, then they're in a judicial system. They proceed according to certain rules. Those rules are set by you all and on proper showing you can change them. The rule here, I think, is simply wrong. As a matter of court management, no litigant should be allowed to extend the time simply by filing a stipulation signed by the other party without an order signed by a judge. I think that's simply, as a matter of principle, wrong. Every treatise you ever read on the subject says if you want to run your docket efficiently, don't lose control of it. Don't cede your document to any outside party. And that's the principle at stake. Finally, there is the suggestion that is following. I'll end on this one. And I'm reminded of Ronald Reagan. His definition of an optimist was the farm kid on his birthday who spends his entire day plowing through that manure pile trying to find the pony that he knows is there. Usually that pony is not there. There is no silver

bullet that will magically solve delay problems at the Court of Appeals. It doesn't exist. It's a hydra-headed monster. You've got to deal with separate components, you have to deal with them discretely, and quite candidly, we don't have to study it any further. We don't have to continue to look for the pony. It's not there. The data I think are reasonably straightforward. We've public with it. We've been as public as we possibly can be. So on behalf of my court and the staff of my court, I ask that you not for any reason send this matter back for further study and further review. That you not delay in attacking the final step in reducing delay. Thank you.

JUSTICE CORRIGAN: Thank you Chief Judge Whitbeck. Any questions?

JUSTICE YOUNG: Chief Whitbeck, I would like to hear somewhat more on the question, if there are multiple contributors to the delay, and I think everyone concedes that there are, as I understand recent events we have just recently created a task force to look at one of the area when I was on the Court of Appeals was always a source of delay and irritation and that is production of the record and transcript which was necessary, obviously, for everybody else to do their job. And we just recently have been blessed by the Legislature for more resources to use in prehearing at the Court of Appeals, it seems to me we've got a lot in play and I guess the question that is being posed is why don't we get some kind of recommendation out of the record production task force and look and see how well the warehouse reduction is progressing with the new resources made available in order to figure out how to balance all the different components, including the briefing. Today I've challenged almost every speaker from the bar about how implacable the bar has been throughout the process that I've been aware of, of ceding any kind of notion that lawyers don't need absolutely every minute that the current rules allow to file briefs. My question is, assuming that the bar has heard that they need to be more flexible, what would be the harm in sort of putting all these pieces together and see how they should be balanced.

JUDGE WHITBECK: Two parts to your question, I think. Let's deal first with the record production task force in which Justice Cavanagh sits and my pro tem, Judge Smolenski, chairs. I think that Mr. Fulkerson accurately portrayed the objective of that task force or work group, as to how long it will take them to do their work. They hope to have their work done this fall or early winter. I would hope that would be the case because then you get to the point where the rubber meets the road. It seems to me without having attended a single one of the sessions or seeing any of the data that we're putting together for that task force, that two things jump out at you. First of all, the 90 days it takes under rule for a transcript to get filed is met sometimes but not every time. It takes a long time to get a transcript filed and on the other hand it also takes money to make that happen. And at the pay grade level which is not set by court rule, it's set by statute, you're at a page rate that the economics of the situation probably just don't work. What does that mean? It means we'll have to go not only to this Court in terms of

changing the court rules with respect to time to file the record, particularly the transcript, we'd have to go to the Legislature and get them to change the pay grade. And, as Mr. Fulkerson indicated, that's not going to be as easy as perhaps our fee increase proposals were. There's going to be opposition unless we can figure out some sophisticated way of incorporating the counties' concerns for the increased cost this will impose on them. So long answer to say I think that process is going to take a long time and you don't get legislative change overnight. My experience has been that it takes time to work your way through that process.

JUSTICE YOUNG: Especially when the counties are opposing it.

JUDGE WHITBECK: Exactly. So I think in answer to a question Mr. Fulkerson or someone else was absolutely honest when he said I don't know how long it will take. And it make a year. It may take 18 months.

JUSTICE CAVANAGH: That is definitely going to be a significant political hurdle. I suggested to the work group that a fall back position could always be having the court reporters going to triple space. Chief Whitbeck, in some of these statistics you've forwarded to us one of the aspects of the process was the delay in judicial chambers, and there's been a significant reduction in that. To achieve that were the panel's monthly caseloads decreased.

JUDGE WHITBECK: They were increased in point of fact. We not only reduced the time in judicial chambers but we added to the work load of the judicial chambers by taking cases selectively and simply bypassing the research division entirely and having them go directly to the chambers unevaluated and without prehearing reports at all. So we did two things at once. We increased the workload in the judicial chambers and we cut the time in half.

JUSTICE WEAVER: So how many cases does a Court of Appeals judge get each month?

JUDGE WHITBECK: Each month on average

JUSTICE WEAVER: Oral argument.

JUDGE WHITBECK: On average each judge gets each month about 30 cases. It may vary upwards or downwards depending on the difficulty, and you know we have a scoring system that the (inaudible) set, but on average about 30.

JUSTICE CAVANAGH: Each judge or each panel.

JUDGE WHITBECK: Each panel. Each judge therefore is reading 30 cases.

JUSTICE WEAVER: A three-judge panel gets 30 cases. When I was there they got 42.

JUSTICE CAVANAGH: When I clerked there there were 9.

JUSTICE WEAVER: And when you were there, Justice Weaver, (inaudible)

JUSTICE WEAVER: (inaudible) guilty plea.

JUSTICE WEAVER: There were guilty pleas, of course, and there were also on average in the early '90s we were using 18 additional, the equivalent of visiting judge, of 18 additional judges on our court.

JUSTICE CORRIGAN: Who no writing responsibilities, so we were writing 21 cases apiece each month.

JUSTICE KELLY: Judge Whitbeck, this is a difficult problem for everyone on all sides of it. You express a concern over the plight of the person convicted of a crime and sitting in prison or jail, saying that if there's too much delay then that person spends unnecessary time in prison conceivably. But we're hearing from people who do their representation that they can't properly represent these people if the process is so accelerated that their briefing is unnecessarily encroached on, and we're hearing not just, and of course what good is it to a criminal defendant who is innocent if his attorney can't properly represent him because of an enhanced time schedule. We're hearing not just from people who represent such people who are in prison, but we're hearing from the people who prosecute them, and they're all telling us the same thing. That this schedule you're proposing is unnecessarily rushed and harsh on them. And we're hearing unanimously from members of the civil side of it as well that they simply can't function well under these schedules. Now it's one thing to say not one day and being obstructionist, if you will, but you and I are hearing universally here that this schedule is too rushed and I'm wondering why, under those conditions, it wouldn't be a good idea to take a second look.

JUDGE WHITBECK: Well we've taken second, third and fourth looks, Justice Kelly. We haven't sort of arbitrarily rushed into this.

JUSTICE KELLY: I don't suggest we have. But I'm saying why not another look under these conditions.

JUDGE WHITBECK: Well let's start from where we are now. Justice Markman asked State Bar President Brinkmeyer did you really mean to say two months from the time an appeal gets filed to the time the briefing gets filed. No, that was a typo. Well it most certainly was. It's 5 1/2 months under the current system. And that does not count the at least 90 days for the transcripts and it counts no extensions based on motions.

So the current system allocates both the criminal and civil attorneys 5 1/2 months to prepare, to go through the briefing process. Now I just don't by that that is a rigorous time schedule now. It is not. It is a very lenient time schedule compared to other states with which we are comparable in terms of caseload, population, etc. We propose to reduce that to 91 days on the civil side and 112 days on the criminal side. Again, I don't believe that is a draconian schedule. I just don't buy it. I believe that there is not a trade-off between quality and timeliness. I do believe there is a natural human tendency to resist change, particularly change that impinges upon one's own life and work habits. And I believe that is what you are hearing from those who are testifying today. I don't believe, however, that that's a unanimous point of view among all practitioners. There are others who may view otherwise and I certainly have talked with some who do.

JUSTICE WEAVER: Judge Whitbeck, I did remember the 13, it's over 13,000 filings that we have in the Court of Appeals at the time I was there, and we had first 18 judges, then 24. Now my understanding is you have 7,000-8,000 filings.

JUDGE WHITBECK: We project this year we'll have about 7,500 filings.

JUSTICE WEAVER: And I applaud the Court of Appeals for its continued efforts to see that its own work--

JUDGE WHITBECK: Well our premise was one that President Neckers expressed better than I. Our premise was we had to be first in the water. That we couldn't say to the Legislature help us out, and we couldn't say to the Bar it's your turn if we didn't do it. We had to be in there first.

JUSTICE WEAVER: That was good sense. And you don't feel that Justice Cavanagh, I gather, there's any solution to the transcript problem.

JUDGE WHITBECK: Yes I do feel there's a solution. I just think it will be one that will not curb within the foreseeable future because it's out of our hands. It's in the Legislature's hands, it's in your hands with respect to certain of the court rules, and I think that's going to take some time. And I simply don't think that, responding to a part of your question, Justice Young, that I don't think I answered, well you won't drain the warehouse right away. It's going to time, that's true. Nor will these rules go into effect right away. If you follow your normal procedure, they will go in effect on January 1. It will therefore, for claims of appeals filed after that time, you're going to have at least 2 or 3 months for the record and transcript production under the current time period so that the rubber won't meet the road until 3 months into the calendar year, which is 6 months into the fiscal year, and by that time we should mathematically have reduced that warehouse by half.

JUSTICE YOUNG: If this Court were to act favorably on your proposal, would you lose interest in a different case intake system.

JUDGE WHITBECK: I remain interested in it. It strikes me that even recognizing the difficulties, all of which were pointed out in exquisite detail the last time around, even recognizing those difficulties, that differentiated case management makes considerable sense. And there are some things we are kicking around that fall short of a formal system but we might be able to nibble at it or take a bite at it more quickly. Two things apart from the technical objections that were filed that strike me is (a) the recognized difficulty in identifying a case right when it's filed as to what's going to happen to it. Is this going to be a "outlyer case", one that takes more than 600 days. It's very difficult to identify characteristics at the outset which will prospectively identify those cases. That's hard to do; (b) unlike a trial court, our judges don't get assigned until rather late in the process so we don't have a judge or panel who is there meeting with the lawyers, setting up the briefing schedule as you do at the trial court level because no judge has yet been assigned. Well how about having staff do it. I recall, I think that process to work has to have the judicial imprimatur, imprimatur of a judge. Then we start to depart from a system that has served us well for good reason, and that is random selection of judges for panels, and then random selection within the panels of cases for each judge to be the initial authoring judge.

JUSTICE YOUNG: Sixth Circuit assigns staff for intake.

JUDGE WHITBECK: (inaudible), but those are the two sort of systemic problems I see. And frankly right now I don't have a good answer to them, nor did the State Bar. They looked at this. We provided to them reams of data.

JUSTICE YOUNG: Why is it an insurmountable barrier to recognize that a case that you think is of one nature of difficulty can't at some point later be assigned a different level of difficulty. That's what the motion for good cause is in a different kind of less focused way, it's a recognition that something is arisen that wasn't anticipated and requires a different kind of discretion to exercise. Why is that so difficult. You make a presumption about what the nature of the case is and if it turns out to be something else, then you reassign it.

JUDGE WHITBECK: I agree. It's not an insurmountable difficulty. It is a front end problem that you've got to be sensible about. And I wish I had--

JUSTICE CORRIGAN: You've got great experts there too like Hannah Watson who can assess with great ability what the case is. It is a 7, is it a 1. And the thing that was amazing about her was how well she predicted. So you've got experts beyond the skill of the judges who can assist in such a process. That's what's remarkable about your court.

JUDGE WHITBECK: I agree.

JUSTICE CORRIGAN: So we are grateful to you and--

JUSTICE WEAVER: I wonder if I might ask another question. I just want to go back to the transcript problem. My understanding is Judge Smolenski is heading up the issue of that and I think Judge Kavanaugh is working on that, is that correct? And do you have plans, I thought you said to me it's not your problem, the Court of Appeals problem. I think it is the Court of Appeals problem, isn't it.

JUDGE WHITBECK: Oh, certainly.

JUSTICE WEAVER: It's everybody's problem. So are you then planning to go out and make known this problem and have you been making known, talking to the press about these issues, that that is a problem.

JUDGE WHITBECK: Yes. One of the things, Justice Weaver, that I, as I get older, I'm finishing up 30 years now of being in and out of public service, that I've come to accept as sort of a given is that for people like us who are elected or appointed, the key to performance is accountability. And there's only one way that folks like us can be accountable, either in the judicial branch or in public branch, and that is if the information is out there, it is publicly understood, it's publicly available, and you can stand up to questioning about that information.

JUSTICE WEAVER: Good. That's why I wanted to know.

JUDGE WHITBECK: That's why we've done that.

JUSTICE CORRIGAN: Thank you all, thank you Chief Judge Whitbeck and thank you all the lawyers who appeared here today for a vigorous laying out of your positions. And this item is submitted.

Item 2: 2002-49; Item 3: 2002-50; Item 4: 2003-9: CANON 7

JUSTICE CORRIGAN: Item 2 this morning is our file 2002-49. I have two speakers listed and I'd like to take Items 2, 3 and 4 since you're going to be up here on these, which all relate to Canon 7 proposals. Jeff Nielson.

MR. NIELSON: Yes, I can still say good morning, Your Honors. I'm Jeffrey Nielson and I first am going to be speaking to the one involving identification of name on literature involving judicial campaigns. In a recent Supreme Court case, Justice Scalia quoted from Planned Parenthood v Casey as follows: "Liberty finds no refuge in the jurisprudence of doubt." I would submit that electoral integrity finds no refuge in an environment of confusion. And before making my next comment I would point out that I really don't perceive the nature of this problem really involves this Court. The fact of the

matter is you are elected statewide. There are only 7 of you, you have 8 year terms. This problem is particularly acute below the level of this Court. The Court of Appeals level and even more so the circuit court and district court, particularly in populous counties. And what this Court is being called upon is to consider a revision of Canon 7 of the Code of Judicial Conduct which at best currently allows judicial candidates to gain electoral advantage from the efforts of other judicial candidates with similar or identical surnames, and at worst represents a tacit agreement among candidates with similar names to build name familiarity from election to election, through generic campaign literature and advertising. And I believe among the written comments you received was a letter from Judges Talbott and Murray who encountered that very situation. The letter speaks for itself in the fact that there were multiple candidates with similar names but there were generic signs just out there that made no reference to the first name of the candidate. The State Bar I note in passing supports this Canon change and I would focus on some of the concerns raised by a couple of the letters you received in this regard. The first challenge raised First Amendment issues. I believe, once again, that's just misplaced in this case. Current Michigan law, for example, MCL 168.560(B) sets forth explicit rules and restrictions as to how a name is to appear on the ballot, in terms of the form of the name, middle name, first name, diminutives. Campaign finance requirements set forth that the name of a candidate's committee must include the first name of the candidate. The fact of the matter, it's ludicrous to suggest that requiring the identification of a candidate's first name is an undue infringement of a candidate's First Amendment rights when the rule serves a compelling state interest, an election free from voter confusion by similar names, thinking the 9th Circuit would probably get this one right. Another example I saw about the objection to this is that the printers printing these lawn signs would be confused. Well speaking from Wayne County, I think Suaki & Sons could figure it out but the fact of the matter is that candidates and their committees are responsible for designing their literature and I think they can figure it out. The final objection was well it's going to cost somebody some money. Well I'll be sure to remember that the next time the government wants to raise my taxes to advance a compelling or significant state interest. Unfortunately I think this does serve a compelling state interest and in conclusion I have no doubt that this Court is interested in allowing the public to better inform itself as to the candidates which see judicial office, and this change allows them to approach such task with greater ease.

JUSTICE YOUNG: Can I ask you a couple practical questions. The proposal as published pretty much eliminates bumper stickers, doesn't it. I never had a bumper sticker but Young for Justice is a little different than Robert Young for Justice on a bumper sticker. I guess you could get one long, and unfortunately Cavanagh would be quite a long one if you had to put Michael on it.

MR. NIELSON: Although I do believe that bumper stickers, because it doesn't require the first name to be the same size as the last name, it may not be as readily visible, again when I promoted this change my main focus was particularly for lawn signs

or for even larger billboards. But the fact of the matter is that because it allows the differential in how the first name appears versus the last name, I still think the bumper stickers could comply.

JUSTICE WEAVER: Yeah, but they wouldn't be very useful would they. In effect you would be eliminating bumper stickers.

MR. NIELSON: I don't believe so.

JUSTICE YOUNG: It would have to be Elizabeth Weaver, we need her. That's quite long.

JUSTICE TAYLOR: Mr. Nielson, I have a question for you. The workability of this proposal you have is problematical. And truly in a political context I think what a candidate wants to do is be able to encourage, so to speak, the opponent with a familiar name to not misuse that asset, that he would in fact say which Hathaway he was in the example you gave.

MR. NIELSON: Yeah, we have three Hathaways up for re-election in the next election.

JUSTICE TAYLOR: What would you think about a canon which was, in its nature, sort of hortatory and not compulsory, as the one you're proposing. For example, language which would say "A candidate for a judicial office should endeavor in campaign communications to reduce name-based confusion with others of whom the public may be aware with the same name." And in answering this think about this. It seems to me if you're running against someone with a name and they're misusing it in this fashion, if you had a canon of this kind you would be able to get public sympathy, perhaps editorial board sympathy even, with your plight. The current situation is they say well it bothers you but there's no rule on it. What would you think about a rule of this sort.

MR. NIELSON: Well again I think to a large degree we're back into an aspirational standard as opposed to expressed conduct, and my good friend, Judge Mack, who is sitting here on another matter would indicate back about 13 years ago some newspaper sympathy was gathered when a very familiar name candidate was running for an open seat on the Wayne County Probate Court, so it is possible to get that. On the other hand the fact of the matter is that if it remains aspirational, I doubt if you would get much compliance.

JUSTICE YOUNG: How about eliminating things other--focusing this on the existing proposal excluding from its coverage anything other than billboards and lawn signs.

MR. NIELSON: I think there's merit when you raise the bumper sticker issue. The main focal point is bumper stickers are not by any nature a sign. On the other hand lawn signs are very big particularly in local judicial races, and those are the ones where this has been most abused. And there's ample space there. So I don't have a problem with the notion that once you get above a certain size that's fine. And again there's also one, and my proposal goes a little beyond maybe what I first indicated but with regard to literature, for example if a candidate sends out literature, almost certainly that's directed to a specific residence and a specific person and that person can see and I really don't have a problem with what they put in their literature. But when they're hanging a billboard or a lawn sign out in public view to capitalize on that kind of familiarity, that's where the confusion comes in. There were people who, in the last election involving Judges Murray and Talbott, were totally confused and said to me why is she running, I thought she was running for circuit court, not for the Court of Appeals.

JUSTICE TAYLOR: One of the problems with your proposal is this involves political speech. The two statutes to which you made reference do not. They're filing requirements and such and ballot requirements. This is political speech. And it may be that a candidate feels that the sort of spin of a certain kind of slogan is virtually obliterated if you have to clutter it up with a lot of names, for example there's a certain cache to Weaver we need her which is taken away with Elizabeth Weaver we need her. And I just use that but there are hundreds of other examples. I think, for example, we have a circuit judge in Lansing whose name is Janelle Lawless and I remember seeing her at a function and I told her, I think I got the way for you to win this campaign, this was before it was going on. She didn't take this advice, by the way, but I said I think you should run a billboard that says Lawless for judge. No kidding. But that would have been all taken away if you say Janelle Lawless for judge, no kidding. In other words, these are touchy things and you have to be very careful and I think one of the things that the Minnesota case, recently from the Supreme Court of Minnesota, talks about is that the states should be careful about tampering with free speech in these areas. So meritorious in concept as your idea is, I think it has real, it gives me reservations about its constitutionality, and not mere quibbles either. I think we want to let candidates be as free as they can in communicating with voters. That's really one of the central strengths of the First Amendment, it seems to me. At the same time I understand we don't want to have them be confused.

MR. NIELSON: I would agree. My comment is that I'm very much in line with you in terms of are you controlling content. And my view is that a candidate's name is a candidate's name. And there is a clear pattern and I can go through other examples. Somebody alluded to the Hathaway family in the last election, although there were a number of other examples that occurred in Wayne County. My expertise does not transcend that area. But the fact is we are talking about the candidate's name and that's where, in terms of radio, we've all heard the radio ads or the TV ads where they're able to do this but at some point, and it doesn't have to be every time you see the candidate's last

name that the candidate's first name has to be right there, but somewhere within the context of the publication, the candidate's first name should be readily identified.

JUSTICE KELLY: Would you think that a website address ought to contain the candidate's first name.

MR. NIELSON: That I think is basically an address. I don't believe that's necessary. Because the website itself is merely for identification purposes to get on. When the website comes up I think the candidate's first name should be readily identified but I don't think it would, for example, have to be www.marilynjkellyforSupremeCourt.com.

JUSTICE KELLY: What if Nielson were running for judge and there were no other Nielson running for judge or anything else. Would this make any sense then? Might you not restrict your recommendation to races only where there is a possibility of confusion.

MR. NIELSON: Well I would make two comments. I would say in passing that oftentimes candidates go out and get literature and make arrangements for things before the filing deadline occurs and they shouldn't be held hostage to decide what they do depending upon who else might join the race. There are certain candidates who are not reluctant whatsoever to include not only there first name but their middle name in their literature. I'd suggest Kirsten Frank Kelly certainly would not object to this canon change. But the point is that having that with a similar name there forces a candidate to have to kind of sit back and see--in your race it would be particularly difficult since most candidates aren't nominated until as late as late August or early September and to kind of wait to decide what you're going to do with literature pending the nomination of other candidates would be problematic from an operational view.

JUSTICE CORRIGAN: Other questions? Your time is up on this point. You are also signed up to talk on Item 4, 2003-9 on Canon 7.

MR. NIELSON: I believe that's the one involving the emptying of the transferring monies from one campaign to another.

JUSTICE CORRIGAN: No, item 4 that you're signed up on is clarifying that Canon 7(B) applies to all candidates for judicial office, not just incumbents.

MR. NIELSON: I think that in the last election there was some issue to the extent that you read Canon 7 there was some confusion as to whether or not for someone who is running who is not a sitting judge and there is perceived violation of the canons, is this something that goes to the JTC or is it something that goes to the Attorney Grievance Commission and whether or not the candidate is bound by those. And I think this is just a clarifying point. I think the spirit of that canon is clearly that people running

for judicial office have to maintain a certain canon of conduct and the canon is not written as clearly as I think it could be.

JUSTICE CORRIGAN: So you support the amendment to this proposal.

MR. NIELSON: Absolutely.

JUSTICE YOUNG: As I see the change it addresses the fact that it explicitly covers candidates for judicial office not just the sitting judges who are candidates. That doesn't answer the further question of what happens when a non-judicial candidate for judicial office violates the canon. Who prosecutes it.

MR. NIELSON: My understanding is that it does go to the Grievance Commission because the JTC applies strictly to judges.

JUSTICE CORRIGAN: Thank you Mr. Nielson. Richard Robinson.

MR. ROBINSON: Good morning, Your Honor, Justices. I'm Richard Robinson. I'm the executive director of the Michigan Campaign Finance Network. We're a non-profit, non-partisan organization that does research and public education on money in Michigan politics. I'd like to first express unreserved support for the proposed revision that makes unambiguous that the canons apply to judicial candidates as well as incumbent judges and justices. I would also like to support the proposed amendment that would preclude a judicial candidate from transferring funds from a pre-existing campaign account. It has been my observation that sitting legislators are able to accumulate significant fund balances in campaign committees even though they are term limited and accumulate during the course of an election campaign, and allowing those funds to be transferred to a judicial campaign account would give them a significant advantage over an incumbent judge who had to liquidate the account at the end of the previous campaign cycle, or someone who had never run for public office. I'm ambivalent to the point of neutrality on the proposed revision requiring display of the candidate's first name in campaign materials. In general, I believe the voters are well served by additional factual information but I think this is excessively intrusive in a marketing device. Finally, I'd like to offer a caution in an era when there are literally millions of unreported dollars spent to effect the outcome of judicial election campaigns. These very modest reforms are pretty much equivalent of bailing the Edmund Fitzgerald with a 5-gallon bucket. And unless and until the Michigan Campaign Finance Act is reformed to establish meaningful contribution limits and accountability, I don't believe these proposed amendments will have very much practical effect.

JUSTICE CORRIGAN: Thank you Mr. Robinson. Any questions? Thank you.

<u>Item 5: 2002-52: STATE BAR RULE 15</u>

JUSTICE CORRIGAN: Next we're up to item 5, State Bar Rule 15. We have Thomas Byerley here to speak on this proposal.

MR. BYERLEY: Good morning. I rise merely to speak in support of the recent letter received from the Standing Committee on Character and Fitness which requests further additions to the proposals which would help crystallize the time period or when the time period would start to run. The original proposal, of course, tries to standardize the waiting period between when an unsuccessful applicant for character and fitness process would be able to reapply for admission. So we support those proposed amendments from the standing committee.

JUSTICE YOUNG: Can you just tell me, for some reason I'm unaware of additional--when did those come in.

MR. BYERLEY: There was some confusion on that. Originally it went to the Court in March but it did not make the court file. But a new one was sent dated September 9.

JUSTICE YOUNG: And the changes are, can you just summarize them very briefly for me.

MR. BYERLEY: Just to add an addition that the time period would start to run if the applicant would take no further action following an adverse recommendation at the standing committee level.

JUSTICE YOUNG: Okay. The bar seems to be unaware of the history of these. It interposed no basis, no rationale for this in the existing lawsuit because it didn't know how they came about. There's a lawsuit on this very issue.

MR. BYERLEY: Yes, yes there is. The only history we could find was the five-year period where that came from to coincide with the period for petitioning for reinstatement after disbarment. We could find no rationale for the 3-year period in subparagraph 17.

JUSTICE YOUNG: Because you didn't know it?

MR. BYERLEY: We could not find it in our records, yes.

JUSTICE YOUNG: Are you recommending that we change this rule now?

MR. BYERLEY: Yes.

JUSTICE YOUNG: Have you consulted with your counsel. Don't you have a director, a member of this lawsuit, a party.

MR. BYERLEY: Yes. And I am counsel for that lawsuit.

JUSTICE YOUNG: Okay, so you're recommending as counsel then.

MR. BYERLEY: Yes. Any other questions from the Court?

JUSTICE CORRIGAN: Thank you Mr. Byerley.

Item 6: 2002-53: MCR 1.109, 2.113; Item 7: 2002-54: MCR 2.406

JUSTICE CORRIGAN: Items 6 and 7. Victor Valenti. These are proposals to amend MCR 1.109, 2.113 and 2.406.

MR. VALENTI: Good morning again, Your Honors. I guess this was kind of an afterthought since I was here on the controversial first item already I just thought that I would offer just a very brief comment on the 12-point type proposal and for that matter on the fax filing proposal. Obviously because of all the other things that have gone on in appellate practice in the past year or 18 months, we did not file any kind of a specific letter supporting these two items but I would tell the Court that I did canvass at least our counsel on our list and said does anybody have any objections to any of these. Spoke to Joe Firestone, who is our technology person regarding the fax filing. I got no responses whatsoever in terms of any objections to them so I think it's safe to say that the section supports these and the only other thing I may want to remind the Court, and you may be well-aware of that, is that there are already IOPs at the Court of Appeals which deal with 12-point type and filing of certain papers by fax. I can give you those cites if it's useful. I thought I'd come up here on a supportive note as opposed to--thank you.

Item 8: 2003-13: MCR 5.408

JUSTICE CORRIGAN: Item 8 which is a proposal to amend Rule 5.408 of the Court Rules, the Honorable Milton Mack.

JUDGE MACK: Thank you. Good morning. May it please the Court, for the next few days I will still be the immediate past president of the Michigan Probate Judges Association and I appear on behalf of MPJA today, which adopted a resolution in unanimous support of this proposal. The current guardianship review system we have in MCR 5.408 goes well beyond the statutory requirements of EPIC. I have read the concerns of various advocacy groups and we share those concerns. That is why I'm here today. Frankly we share the same mission. The way that Judge Joseph Pernick once said, the probate courts protect those least able to protect themselves. The current guardianship review process is expensive, inconvenient to the public and produces little value in the larger counties. The advocacy groups are misguided in thinking that the current review system produces value in larger counties. They worry that another Guardian, Inc. will go undetected. The fact is the current program started in 1991. Since that time the Wayne County Probate Court has conducted over 59,000 reviews. In essence we are conducting

field audits for 40% of our guardianships on an annual basis. Of these 59,000 reviews, 22,000 were performed prior to the Guardian, Inc. problem. None of these reviews ever identified a problem with Guardian, Inc.'s performance. All we have done is built a bigger haystack, making it more difficult to find that needle. The resources we have in terms of staff and money can be utilized in a better way. It has been suggested that we find volunteers. We tried. The job is too big. Sixty Plus, Inc. notes that they have performed 161 audits for a 20-month period. That's good but it's a drop in the bucket for a large county. It has been suggested that some performance measures be included in a local plan. If we applied performance measures to the current system it would have been abandoned years ago. The fact is we have developed new processes and procedures since Guardian, Inc. that have enabled us to identify and correct problems. In some cases we have been able to employ non-punitive measures while in others we have been forced to employ punitive measures including referral to state and federal law enforcement agencies and the bar association. However, in none of these cases were the investigations triggered by issues raised in the guardianship review. We only seek the opportunity to develop a more cost-effective method to protect the courts' wards. The bottom line is that under this rule change any plan would have to be approved by SCAO. If we cannot convince SCAO we have a better plan, we understand we will be left with the current process. All we are asking is for the opportunity to demonstrate that there is a better way. And I'd be happy to answer any questions.

JUSTICE CORRIGAN: Any questions, Justices? Thank you Judge Mack for coming today.

JUDGE MACK: Do I have a minute left?

JUSTICE CORRIGAN: Finish your thought.

JUDGE MACK: Just, by way of example, we've spent over $5 million on this program. We think the estates have been charged that much too. Take my docket on Wednesday. Relatively few number of cases were identified for review through this whole process and they came up for hearing yesterday in my court. There were 6 of them. Four cases were situations where they couldn't find the guardian or the LIP. One case was where the guardian had died and needed a new guardian. And one case were allegations of neglect, not abuse but neglect. Those cases were heard, investigated and we terminated the guardianship entirely in four of the cases, appointed one new guardian. The case where there was an allegation of neglect, what had happened was the guardian had stopped carrying out her responsibilities because her brother was living on his own and doing just fine and didn't need a guardian, didn't tell us about it. So we terminated that guardianship as well. So we think we have systems now which work much better than the current system. Thank you.

Item 9: 2003-23: CASEFLOW MANAGEMENT STANDARDS

JUSTICE CORRIGAN: Item 9 this morning is 2003-23. This is a proposal regarding case flow management standards. Paul Fischer.

MR. FISCHER: Good morning, may it please the Court, I'm Paul Fischer, the executive director of the Judicial Tenure Commission.

JUSTICE CORRIGAN: Are you here representing the Commission or on your own behalf.

MR. FISCHER: Both. I filed one as an email and I sent it to the Commissioner saying look what a good job I did and they said oh, we like that, send one in for us too. And I sent a letter on behalf of the Commission.

JUSTICE CORRIGAN: All right, very well, go ahead and make your comments.

MR. FISCHER: The Commission, since last year, has been keeping statistics on delay and one of the things that we have on delay is post-judgment delay. 8% of our cases involved post-judgment delay in 2002 and so far this year we're at 6% so it is a factor and its something that--

JUSTICE CORRIGAN: These are complaints of judicial misconduct coming to the Commission as a consequence of post-judgment delay.

MR. FISCHER: Exactly. In a case that's sitting around, and oftentimes a post judgment delay which is what I'm going on to now, but how do you define what post-judgment delay is. There is nothing in the standards to show what it is. And how fast the case would go in a prejudgment state and the Commission feels it would be helpful to have some standards set by the Court so that there is an objective standard so the Commission can say no, you've gone over it and so that constitutes grounds for whatever, an admonishment, a caution, whatever it would be. So we don't have any standards to offer, we just think the Court should do one.

JUSTICE YOUNG: You'd like us to look at setting standards for post-judgment day.

MR. FISCHER: In divorce, criminal especially. 6.500 motions pop up every time.

JUSTICE MARKMAN: Was everything you just said both in your individual capacity and in your JTC capacity?

MR. FISCHER: Yes.

JUSTICE CORRIGAN: Thank you Mr. Fischer. And finally Judge Thomas Power.

JUDGE POWER: In the trial court we usually take a break every hour and a half so I respect your stamina. I'm here to talk about the caseload management guidelines. Let me start my watch here. The two areas I would like to mention to you are the divorce guidelines and the extraordinary writ guidelines. The others appear to us to be quite reasonable and workable. On the divorced without children guidelines, 90% of the cases are to be adjudicated in 91 days. Well, there's a 60 day statutory waiting period so that means that 90% of the cases have to be adjudicated from one month from at the end of the waiting period until the 91st day. Without any intervention at all, just by giving them a date immediately after the waiting period, in our circuit we resolve, without any other intervention, 60-65% of these cases. In order to get to 90% we're going to have to intervene in each divorce case at the very beginning, scheduling orders, witness exhibit disclosure, expert disclosure, all the discovery, get all that underway in each and every one of those cases in order to go from 65 to 90%. I suggest to you that's a lot of staff and court resources. That's a lot of client time, a lot of client money for attorneys, and all of that to get a slightly faster of 20-25% of those divorce cases. I don't see any policy served by that. At the outlyer end we are required to complete 100% within a year. And it seems to me that if you have a major divorce case, a long-term marriage, they've got a business that particularly one spouse has been heavily involved in, you've got property that needs to be valued, you've got pension valuations and maybe separate property issues like gifts and inheritance, alimony questions and typically one spouse is less involved in the financial affairs than the other, so there needs to be discovery. It's effective if you're going to have a fair outcome, and of course fault. And then you have to be prepared to have a trial and recognize that occasionally somebody gets really sick on the eve of trial and you have to adjourn it and then we're supposed to get those outlyers done in one year. Now regular civil cases the outlyer rule is 2 years. I see no reason for that and I think it's unnecessary. Domestic relations with kids, I can say the same comments about that. That's paragraph 2(B) except we are missing in that a quicker schedule for resolving the child issues. Custody, parenting time and support should be resolved much quicker than what they have in there for all the other issues and I would suggest that 4-5 months for 90% of the cases child issues should be resolved and maybe 100% in 10 months. Lastly, the extraordinary writs, the most common of which are injunction, we are required to adjudicate 98% of them in 35 days and 100% in 91 days. In an injunction matter that really is ridiculous. Because you have an environmental case to enjoin some bridge over the Boardman River, which we may see this case here soon, and there's an extensive administrative history in the administrative agencies, there's a lot of complicated material about flora and fauna and soil and all the science that goes in it, expert witnesses that have to be deposed, and all that, and all the legal issues, the environmental laws, and then we're supposed to have a multi-day trial and have it decided in 91 days. That is not fair, it's not realistic.

JUSTICE CORRIGAN: Judge Power, have you submitted the observations that you're making now in writing to our Court.

JUDGE POWER: I have not.

JUSTICE CORRIGAN: I would invite that you do that.

JUDGE POWER: I used to be in the Legislature and I never read that stuff on committee so I assumed you wouldn't either but if you would like I will put this in writing.

JUSTICE CORRIGAN: If you would it would be helpful. Because this is new material to me.

JUSTICE YOUNG: Can I just ask in terms of, these are guidelines right?

JUDGE POWER: Yes, they are not legally binding but it seems to me that guidelines should be realistic. They should be guidelines that a well-run court should be expected to meet.

JUSTICE YOUNG: Well it strikes me that the environmental case, the expression is if you hear thunder and hoof beats, think horses, not zebras. It sounds to me you're describing with the environmental case a zebra. These rules are designed to govern the horses in the corral.

JUDGE POWER: All right, let's take the more common injunction in Northern Michigan. Somebody comes into court because somebody else is cutting wood on their property, a lumber cutting company. There's a dispute about whether they gave permission or not. The permission was one side says it was for four-inch trees and the other side says it was for 6-inch trees. There's a dispute whether the trees really being cut are that size or not. Now it's one thing to require prompt relief for temporary restraining orders and preliminary injunctions, but to have a final injunctive outcome in 91 days--I mean that's a real case, it deserves a real trial and real discovery, and you can't do that in 91 days. And there's no policy reasons why we should do it in 91 days. And that's the most common extraordinary writ.

JUSTICE CORRIGAN: Thank you Judge Power. This session of the Michigan Supreme Court is adjourned.